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ABSTRACT

The definition of religious freedom from the Virginia Statute for Religious Freedom (1786) to the most recent U.S. Supreme Court decision is not clear and well-defined. The two religious clauses found in the First Amendment to the U.S. Constitution (those denying Congress the right either to establish religion or to prohibit its free exercise) applied only to the federal government for the first 100 years of U.S. history. Early court cases included Barron v. Baltimore and Permoli v. First Municipality of New Orleans. Court related issues included religious tests for public office, tax exempt status for property used for religious purposes, and enforced laws against blasphemy. Social issues involved opposition to Catholics, Jews, and atheists, and a general lack of religious tolerance. Following the Civil War, new problems arose concerning religious freedom. The U.S. Supreme Court ruled in favor of a belief/action dichotomy and established the incorporation doctrine, whereby it was determined that the rights guaranteed in the first eight amendments limited the actions of states as well as of the federal government. A number of cases testing either the "establishment" clause or the "free exercise" clause are described. Cases such as McCullum v. Board of Education and Wisconsin v. Yoder pointed out the difficulty in delineating the proper line of neutrality in the establishment clause cases, while the case of Wisconsin v. Yoder, in which Amish beliefs came into conflict with state law, represented a landmark victory for the idea of "free exercise." An appendix contains excerpts from 23 documents including: The Virginia Statute for Religious Freedom; John F. Kennedy on Church and State; and 13 Supreme Court decisions on religion clause cases. (DMS)

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Two Hundred Years of Mr. Jefferson's Idea

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A "WALL" OF SEPARATION

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The Expansion of Religious Freedom in the United States

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INTRODUCTION

One of the glories of the United States is the freedom it has offered to all varieties of religious beliefs; the First Amendment to the Constitution prohibits any interference with the free exercise of religion or the establishment of any one creed at the expense of others.

Virginians played an important role in establishing freedom of religion as a basic component of American democracy. Virginia Baptists petitioned for relief from paying taxes to support the established Church of England in colonial times. After independence was won, Thomas Jefferson, James Madison, George Mason and others led in securing the adoption of the Virginia Statute for Religious Freedom, the prototype of all other state guaranties of religious freedom, and the direct forebear of the First Amendment.

In the two hundred years since the General Assembly of Virginia passed the Statute, the idea of religious freedom has spread and expanded. This publication traces the growth of "Mr. Jefferson's idea," one of the most important legacies he and his beloved Virginia gave to the nation.

Important objectives of this publication are:

- To emphasize the fact that religious freedom is not a given, but has been fought for over the past two centuries;
- To develop a better understanding of what the Free Exercise and Establishment Clauses of the First Amendment mean;
- To provide both documents and an analysis for expanding an understanding of one of the most important elements of American democratic society; and
- To further an appreciation of our heritage of freedom.

This publication was prepared in cooperation with the Citizens' Committee to Commemorate the Bicentennial of the Virginia Statute for Religious Freedom. It is hoped that the contents contained herein will prove to be a valuable asset to teachers and other educators in efforts to commemorate this memorable event in the history of our great nation.

S. John Davis
State Superintendent
of Public Instruction

S. Joseph Ward
Chairman, Board of Directors
Citizens Committee to Commemorate
the Virginia Statute for Religious
Freedom

THE STATUTE OF VIRGINIA FOR RELIGIOUS FREEDOM

Drafted by Thomas Jefferson in 1777 and adopted by the General Assembly in 1786

WHEREAS ALMIGHTY GOD HATH created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right; that it tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them:

Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall other-

wise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

And though we well know that this assembly elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.

The text is from William Waller Hening, *The Statutes at Large* (1823), XII, 84-86. Made available in a limited printing by the University Press of Virginia, Charlottesville, 1964.

TWO HUNDRED YEARS OF MR. JEFFERSON'S IDEA

An Essay

The adoption of the Virginia Statute for Religious Freedom in 1786 (Document 1) marked a major step away from state support and enforcement of one particular religious belief and toward an open, tolerant society in which each individual could practice his or her own faith without fear of governmental coercion. Important and revolutionary as the disestablishment of the Anglican Church may have appeared at the time, the greater significance of the Statute lay in its assumption that religious matters were of a totally personal nature, beyond the legitimate scope of the state. Jefferson personified this view when he wrote to a friend in 1816: "I never told my own religion, nor scrutinized that of another. I never attempted to make a convert, nor wished to change another's creed. I never judged the religion of others. . . or it is in our lives and not our words that our religion must be read." The past two centuries have seen the playing out of this idea, of keeping government and religion separate, so as to allow each person the right to believe, or not to believe, according to the dictates of his or her own conscience.

In the period between the Declaration of Independence and the establishment of government under the Constitution, several states moved in the direction of greater religious freedom. None went so far as Virginia (except Rhode Island, which had pioneered in protecting individual conscience), and some resisted the trend, but well before the Civil War, disestablishment and individual religious freedom had become hallmarks of the new nation, perhaps the brightest flame in the torch of opportunity which beckoned millions of immigrants from the Old World to these shores. But, as Mr. Justice Douglas later wrote, "We are a religious people whose institutions presuppose a Supreme Being," and it has been impossible to separate totally state action and individual conscience. The history of Mr. Jefferson's idea has been a constant reevaluation of where the line should be drawn. That has not been an easy task, and as Mr. Justice Powell noted, "Jefferson's metaphoric 'wall of separation' between Church and State has become 'as winding as the famous serpentine wall' he designed at the University of Virginia."

The spirit of liberty which suffused the Declaration of Independence spread into several of the new states in the form of bills of rights, and nearly all of these included references to religious freedom (Document 5); Virginia, in fact, adopted its Declaration of Rights a few days before the Continental Congress proclaimed independence from Great Britain. Pennsylvania also quickly asserted the "unalienable right" of all men to worship God "according to the dictates of their own consciences and understanding," and condemned compulsory public worship and the required support of religion. But while no one who acknowledged "the being of God" should suffer loss of civil rights because of religious belief or practice, the new state constitution did establish a test oath for membership in the assembly. Would-be office holders had to declare their belief in the divine inspiration of the Old and New Testaments; the last removed disabilities from Catholics, but still left Jews and other non-Christians in a distinctly inferior position.

North Carolina's bill of rights, also adopted in 1776, disestablished the Anglican Church, but limited office holders to Protestants, and precluded clergymen who occupied pulpits from holding state office. Not until 1835 would the word "Protestant" be changed to "Christian," and Jews continued to be excluded from office until 1868, when the post-Civil War constitutional revision finally did away with any reference to religion, although applicants for office still had to affirm their belief in God.

New York came closest to Virginia and Rhode Island in establishing religious freedom; the New York Constitution of 1777 guarantied the free exercise of "religious profession and worship . . . without discrimination or preference," although John Jay attempted unsuccessfully to limit the rights of Catholics, whom many Protestants at that time believed owed their primary loyalty to the Vatican. Jay did succeed in requiring all applicants for citizenship (a matter of state control until passage of the Fourteenth Amendment) to renounce "all allegiance and subjection to all and every foreign king, prince, potentate and State, in all matters ecclesiastical as well as civil." New York also excluded clergy from office, and while disestablishing the Anglican Church, allowed it to retain earlier royal grants of land. In 1784 a constitutional revision revoked these grants, but anti-Catholic prejudice then triumphed in the establishment of test oaths, which were not repealed until 1806.

Where in New York and the southern states the Anglican Church had been identified with royal government in Great Britain, in New England the established Congregational churches were of local origin, and strongly defended by influential elites. Connecticut did not write a new constitution, nor did it disestablish the churches; not until 1818 did the state finally adopt a new constitution with a religious freedom clause. Massachusetts, which had the most conservative declaration of rights of the thirteen original states, also did not disestablish the church despite a clause

declaring that "no subordination of any one sect or denomination to another [should] ever be established by law." In fact, the state constitution of 1780 included a clause on the duty of religious worship, and Catholics were disqualified from holding public office.

The other states, even while disestablishing the Anglican Church, nonetheless enacted a variety of constraints aimed primarily at Catholics, Jews, and non-believers. Maryland and South Carolina recognized Christianity in their constitutions, and several states permitted legislation to require citizens to contribute to religion, although allowing them the choice of which church to support; test oaths were also common. One can certainly discern major steps forward from colonial conditions, but the revolutionary generation for the most part still considered religion so important a part of civil life as to justify some degree of state coercion for its support.

The Articles of Confederation, under which the United States was governed from 1781 to 1789, left matters of religion almost entirely to the states. As John Adams wrote, "I hope that Congress will never meddle with religion further than to say their own prayers, and to fast and to give thanks once a year. Let every colony have its own religion without molestation." In the most important statute enacted under the Articles, the Northwest Ordinance of 1787 (Document 2), Congress affirmed that "the fundamental principles of civil and religious liberty . . . form the basis whereon true republics, their laws and constitutions are erected." In the pact which Congress made with the new states to be carved out of the territory, the first article guarantied that "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiment." If Congress decided that some of the profits from the sale of public lands might go to support churches, the money would be apportioned according to the number of adherents each denomination claimed.

The adoption of the Constitution itself did little to advance the cause of religious freedom in general, although the Founding Fathers did prohibit any religious tests for federal office in Article VI, Section 3, the only reference to religion in the document. During the debates over ratification, a few people defended the idea of a test; far more, however, wanted the Constitution to have definite guaranties of religious liberty (Document 3). Jefferson, then American minister to France, upon receiving a copy of the Constitution from Madison, wrote that on the whole "there is a great mass of good in it," but "a bill of rights is what the people are entitled to against every government on earth." Several states in effect ratified the Constitution on condition that it be amended to include a bill of rights, and to this task James Madison applied his considerable talents in the first Congress to meet under the Constitution. From his labors came the first ten amendments, ratified in 1791, of which the First Amendment has been the bulwark of civil liberties in America for nearly two hundred years:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for redress of grievances.

The bunching of these various rights within the same amendment is far more than an act of economy, for they all deal with the right of the people to express themselves, to be free of state coercion in voicing their religious beliefs, their ideas, and even their complaints. Not surprisingly, many of the First Amendment cases which have come before the Supreme Court cut across the artificially imposed categories of simple speech or press or religion; rather they deal with the limits of governmental power to restrict man's mind and the untrammeled rights of expression.

Much of the litigation over the two religion clauses would not occur until the modern era, however, for the first century after passage of the Bill of Rights it applied only to the federal government. This was certainly the view of the Framers (Document 8), and confirmed by the Supreme Court in *Barron v. Baltimore* (1833). A decade later the Court upheld a local ordinance regulating burial practices on the basis of health reasons, and specifically ruled that the First Amendment did not apply to the states; *Permoli v. First Municipality of New Orleans* (1845). Thus, the limits of religious freedom in the nineteenth century were defined not by the national government, but in the states. While the tale is one of increasing liberty, the pace was ragged, with declarations on the subject often contradictory. Nearly every state adopted in its constitution some clause proclaiming religious freedom, but upon closer examination this liberty was far from absolute.

Religious tests for public office remained in effect in some states until after the Civil War. In many places one had to swear to a belief in a Christian religion, thus barring Jews (Maryland allowed Jews to qualify by taking a special oath that they believed in a future state of rewards and punishments). In some states Catholics were also debarred, as were atheists. de Tocqueville recorded a case where an atheist's testimony was rejected because he could not swear to the appropriate oath. Gradually, however, the test oath disappeared in most of the country, not only for public office but for jury duty as well. The Oregon constitution of 1859, for example, prohibited religious tests for jurors and witnesses, and also forbade putting any questions to a witness regarding religious beliefs, lest it "affect the weight of his testimony." The Supreme Court finally declared test oaths unconstitutional in *Torcaso v. Watkins* (1961).

Today we would consider a law excluding clergy from holding public office as a violation of civil liberty, but Americans in the late eighteenth and early nineteenth centuries saw this as one means of separating church and state. Restrictions of this type appeared most frequently in the older seaboard states, which remembered the days of established churches and ministerial meddling in political affairs. The younger, transmontaine states, which had never known the problems of establishment or clerical politicking, rarely utilized this restraint. By the eve of the Civil War, though, most states had abandoned the practice.

Americans of the revolutionary and post-revolution-

ary generation were not opposed to religion, and in fact sought the fullest freedom for each person to worship as he or she chose. But the vast majority never believed in total separation of religion and the state, only that the government should not favor one denomination above others. In what some people today consider a gross violation of the First Amendment, state and localities have always granted tax exemptions to church-owned property used for religious purposes. The practice began when governments routinely granted preferences and direct support to religion, since the church provided theological support to maintain civil harmony. Since the adoption of separation, defenders of tax exemption point to the social, cultural and philanthropic work of religious agencies to justify the policy. A true separation of church and state would, of course, do away with the practice, but most Americans see it as a harmless method of supporting religion, and since all denominations can benefit, no one group gains a preference.

During the nineteenth century many states also enforced laws against blasphemy, on the ground that by offending religious-minded people, it would disturb the public peace. In the 1830's, Massachusetts imprisoned Abner Kneeland, a free-thinker who had published statements "scandalous, impious, obscene, blasphemous and profane . . . concerning God." A number of prominent churchmen, although obviously not in sympathy with Kneeland's views, petitioned for his pardon, on the grounds that his religious views had been restrained. Some states have retained these laws on their books until today, but have not enforced them for decades.

The most serious interference by state governments with religious liberty came in the form of restrictions on Catholics, Jews and atheists. Test oaths have already been mentioned, but these groups suffered under other restrictions as well. Anti-Catholic sentiment in the United States stemmed directly from the post-Reformation prejudices of western Europe, which viewed the Church in Rome as a threat to secular independence. That the Church had been, and would continue to be, involved in affairs of the state cannot be denied, for Church doctrine held that its responsibility for the care of souls extended into all domains of temporal as well as spiritual activities. Nor can one overlook the extensive political activity of many high church figures, such as the Medici popes, Cardinal Richelieu in France, or Cardinal Wolsey in England. By the time of American colonization, the fear of a world-wide Catholic conspiracy directed from St. Peter's had become a staple of Protestant thought.

For Catholics, an important struggle during the early decades of the new nation involved the Church's view of its control over all aspects of religious affairs, including control of church property, which ran against the American tradition of local, lay ownership of congregational tangibles. Most states passed special incorporation laws to provide for supervision of church buildings and property by lay-elected trustees, while the Catholic Church insisted that its bishops determine such use and disposition. Pope Pius VII directly addressed this issue in *Non Sine Magno* (1822), in which he wrote to Bishop Marechal of Philadelphia that goods "which are offered for divine worship, and for the support of the church, and its ministers, fall under the power of the Church. Thus, since Bishops by divine ordination are those who are placed over the church, therefore they cannot be excluded from the care, disposition, and supervision of these goods." Although the Church continued to press for clerical control, in the end it had to abandon the effort; whatever might be said about state interference with religion, the tradition of local, lay control proved triumphant in America.

Unfortunately, harsh and intemperate words were said on both sides of this long-simmering dispute, which inflamed existing prejudice and played into the hands of a rising anti-Catholic movement in the second quarter of the nineteenth century. The religious and secular press carried one article after another on such topics as "Is Popery Compatible with Civil Liberty?" many of which passed well beyond the limits of truth and decency. In the 1830s, a young girl dismissed from her job at the Ursuline Convent in Charlestown, Massachusetts, told lurid and false tales which spread like wildfire. The town fathers then refused permission for burial of two Catholic children in the Bunker Hill cemetary on the grounds that the health regulations permitted the internment of Protestants, but not of Catholics! On the night of August 11, 1834, a mob attacked the convent and burnt it to the ground. A local jury acquitted the accused ringleaders when they were tried for arson, and when the bishop applied to the state legislature for funds to rebuild the convent, a new wave of anti-Catholic sentiment spread across the state.

Perhaps no other religious issue in the pre-Civil War era so inflamed public passion, however, as the Catholic drive to secure public funds for parochial schools. In Europe, state support of religious schools was commonplace; in those countries where both Protestants and Catholics operated academies, the state normally gave money to both. In America, however, the principle of separation precluded such support, although the Catholics correctly claimed that public schools implicitly taught Protestant religious principles. Public schools, for example, used the King James Bible, and the religious epigrams in the widely-used Webster Speller embodied Protestant views. In the 1830s and 1840s, the Catholic Church, primarily through its teaching orders, established numerous primary schools in order to protect Catholic children from the suspected prosletyzing influence of public schools. During this same period, the drive for expansion of tax-supported common schools, led by Horace Mann, gained enormous ground, and the Catholic hierarchy reasoned that since it shared the burden of teaching children, it should also share in tax revenues allocated toward education.

Combined with a growing Catholic immigration to the United States, the parochial school issue triggered a massive nativist movement which charged the Pope with trying to gain control of the country. Various political parties sprang up, committed to thwarting the alleged papist conspiracy. Anti-Catholic revolts occurred in several cities, including Philadelphia, the "city of brotherly love," and lurid stories circulated

widely about the evils of the Church, and the persecution it inflicted on those attempting to escape its clutches. The climax came in the Know-Nothing Party, which grew out of the nativist Order of the Star Spangled Banner. Article II of the Know-Nothing platform declared that the party's object was "to resist the insiduous policy of the Church of Rome, and other foreign influences against the institutions of our country, by placing in all offices . . . none but native-born Protestant citizens."

Fortunately, the decline of the Know-Nothing Party was as rapid as its meteoric rise. Responsible citizens recognized the danger of religious bigotry carried to such extremes; as former president John Tyler wrote to his son, the Know-Nothing hatred of Catholics seemed unfounded, for "that sect seems to me to have been particularly faithful to the Constitution of the country, while their priests have set an example of non-interference in politics." (Document 9) Abraham Lincoln also denounced the Know-Nothings, and declared that if the movement gained ground, he would prefer to move to Russia, "where despotism can be taken pure, and without the base alloy of hypocrisy." The anti-Catholic sentiment faded as public attitudes focused on the evil of slavery, and the Civil War it caused.

Fortunately, anti-Catholic prejudice, despite repeated efforts, did not succeed in securing statutory expression, despite a stream of petitions to Congress and the state legislatures to "do something" about the Papists. Moreover, the Catholics won an important victory in 1813 for themselves and for the cause of religious liberty. An essential component of Catholic doctrine is the sacrament of the confession, and for centuries matters discussed by priest and penitent in the confessional booth had been considered sealed, beyond the reach of secular inquiry. A priest, Father Anthony Kohlmann, S.J., had been handed goods by a thief after the culprit had repented and confessed his sin, and Father Kohlmann then returned the property to its rightful owner. The police summoned Father Kohlmann, and wanted him to name the burglar; he refused, claiming he could not repeat information given to him in confession.

In the court case that followed, it should be noted that the four judges of the Court of General Sessions of New York City, as well as counsel for both sides, were Protestant. (Document 6). The court unanimously upheld the principle of confessional sanctity, and in 1828, the State of New York passed legislation giving statutory enforcement to the old common law doctrine of priest-penitent confidentiality. Over the years other states have enacted similar laws. The Supreme Court of Nebraska, in *Hill v. State* (1901), upheld that state's statute, declaring that confession must be made "in confidence of the relation and under such circumstances as to imply that it should forever remain a secret in the breast of the confidential advisor." Although Catholics alone have confession as a rite, the idea of confidentiality surrounding communications between a person and his or her spiritual advisor, be it priest, minister or rabbi, has been accepted in both statutory and common law through most of the country. What started as a test of one religion's practices has now spread to enhance the freedom of conscience of all. Slowly the old prejudices against Catholics as disloyal pawns of a foreign potentate began to fade, although they have appeared in this century in relation to the candidacies of two Catholic politicians, Alfred E. Smith and John F. Kennedy, for the nation's highest office. (Documents 10, 11)

Although Protestants did not fear a Jewish conspiracy (in fact, the early Puritans admired Judaism), Jews also suffered from centuries-long religious bigotry. The New World, because it was "born free," did not have to overthrow the medieval institutions which had sanctioned antisemitism; nonetheless, seeds of prejudice did cross the Atlantic, and the small Jewish communities which dotted the seaboard had to overcome their fruits. And, like the Catholics, they received aid from Protestants who firmly believed that in the United States no room existed for the type of religious persecution so prevalent in the Old World. "Happily, the Government of the United States," as George Washington told the Jewish community of Newport, "which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens." Madison and Jefferson offered similar assurances that in this country religious freedom, and not tyranny, would be the rule.

But many Americans considered this a Christian country, and if they feared a Catholic conspiracy, they felt less than comfortable with Jews as well. In Maryland, as in other states, the post-revolutionary Bill of Rights provided a long step toward religious freedom, but limited it to Christians. Thomas Kennedy, a devout Christian, led the fight to extend liberty to Jews as well, beginning in 1818. (Document 7) He was unable to get the so-called "Jew bill" passed by the state legislature until 1822, but since it involved a constitutional amendment, it had to pass the subsequent assembly as well. Religious toleration thus became the central issue of the 1823 election, and nativists, already upset at the growing Catholic presence in America (despite the fact that Maryland had been founded as a Catholic refuge), came out to defeat Kennedy and the bill.

Perhaps because Jews were so small a group, or perhaps because other states looked upon Jews as good citizens, or perhaps because the blatant prejudice offended many citizens, the battle for Jewish rights now received strong support from other states. Newspaper editorials called on Maryland to redeem itself. The influential *Niles Register* wrote: "Surely, the day of such things has passed away and it is abusive of common sense, to talk about republicanism, while we refuse liberty of conscience in matters so important as those which have relation to what a man owes his Creator." The pressure had its effect, and Maryland gave full political and religious rights to Jews in 1826. By the Civil War, only North Carolina still restricted Jewish rights, and that disability disappeared in 1868.

On the federal level, the bill establishing government for the District of Columbia included provisions for chartering churches, but, probably due to an

oversight, did not mention non-Christian houses of worship. There had been no Jewish community in Washington at the time of its founding, but by the 1850s a small congregation had come into existence, and it petitioned Congress for an act allowing it to build a synagogue. Senator Lewis Cass of Michigan championed the cause, and called the existing act with its limitations to Christian churches "an act of gross injustice, and . . . a disgrace to our jurisprudence." Had there been a test case, a court might well have found the old law in violation of the First Amendment, but Congress quickly remedied the defect.

By the Civil War, then, the idea of religious freedom had expanded significantly from the early issue of disestablishment. Nearly all states had adopted and implemented bills of rights to provide individual liberty of conscience, and despite a pervasive sense that America was primarily a Protestant Christian nation, had removed civil and political disabilities from Catholics and Jews. The federal government, bound by the First Amendment, had never attempted to intrude into religious matters, and in religious freedom as in the political domain, the United States appeared to those suffering from oppression in the Old World to be "the best hope of freedom."

After the war, however, the United States underwent significant economic, social and demographic changes, and with them came new problems of religious freedom. With the passage of the Fourteenth Amendment in 1868, the strictures of the First Amendment gradually came to be applied to the states as well, and in nearly all cases, the issue would be resolved by the Supreme Court. As de Tocqueville noted long ago, in America nearly all important issues ultimately become judicial questions. The trend is apparent in the latter third of the nineteenth century in a handful of cases, but the full impact, and the constitutional expansion of those ideas first articulated by the Founding Fathers, would only reach fruition in modern times. The rest of this essay, then, properly focuses on our high court's determination of what the religion clauses of the First Amendment mean.

The most important religion case before the Court in the latter nineteenth century involved a new religious sect, the Church of the Latter Day Saints, commonly called the Mormons, which, among other things, believed in polygamy. A federal law prohibited bigamy in the territories, and a Morman challenged the statute as violating his right to free exercise of religion; his faith, he claimed, required him to take more than one wife. Chief Justice Waite, in the first important case before the Court on the religion clauses, drew an important distinction between "belief" and "action." The First Amendment prohibited Congress from passing any law interfering with what a person believes, but left it power to reach action subversive of social order. "Suppose," he wrote, "one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government [could] not interfere to prevent a sacrifice?" Modern society, he noted, had condemned polygamy. To permit it, on the basis of religious belief, would make religion superior to the law of the land, "and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." (*Reynolds v. United States* [1878])

The belief/action dichotomy has been a crucial element of First Amendment jurisprudence ever since, and while it holds the potential for abuse of the free exercise clause, it strikes a necessary balance between social order and individual conscience. One can believe what one wants, no matter how strange or idiosyncratic that belief may be; but the state has an imperative need to protect civil peace, and under a free government, that need must also be met. Waite implied that conduct outside the First Amendment need not be protected at all; subsequent courts, as we shall see, have extended the ring of protection so as to include more "action" that qualifies as legitimate religious expression.

The applicability of the First Amendment to the states did not become automatic with the passage of the Fourteenth Amendment, which primarily concerned itself with the Reconstruction of the Union and the citizenship of the former slaves. But the first section read: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Eventually, through a doctrine called *incorporation*, the Supreme Court determined that the rights guaranteed in the first eight amendments limited the actions of states as well as of the federal government. But in the nineteenth century, the Court was not ready to take that step. In *Spies v. Illinois* (1887), Chief Justice Waite, for a unanimous Court, ruled that the Bill of Rights still applied only to the national government; not until 1923 did the Court begin to expand the First Amendment to include the states.

In *Meyers v. Nebraska*, the Court examined a state law passed in the midst of the anti-foreign sentiment of World War I, which prohibited foreign language schools for children under ten. The Court's decision came from the pen of Justice James C. McReynolds, supposedly one of the most reactionary men ever to sit on the high bench. In a path-breaking decision, McReynolds expanded the Fourteenth Amendment's concept of liberty to denote "not merely freedom from bodily restraint but also the right of the individual to . . . acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience." Two years later, in *Pierce v. Society of Sisters*, McReynolds upheld a challenge by parochial and private schools to a nativist-inspired Oregon law requiring children to attend only public schools. If one chose to have one's child educated in a religious environment, the Court declared, the state had no power to deny this right. With these two cases, the process of incorporation began.

There are two clauses in the First Amendment dealing with religion, the *establishment* clause and that on *free exercise*. Naturally, the two are related, for

state preference of one denomination would inevitably restrict the free exercise by adherents of another. But, and on such items do our constitutional guaranties of liberty develop, a comma separates the two clauses. As a result, two separate strands of jurisprudence have developed. The two are not totally isolated; indeed, all the various guaranties of individual liberty and expression are intertwined. But for purposes of analysis, it is useful to examine them as the Court has done.

The cases on the *establishment* clause have dealt primarily with two issues, the intrusion of religious matters into governmental activity, especially religious activities in public schools, and governmental aid to religious organizations. The *free exercise* cases often raise problems of the belief/action nature, but also deal with the extent to which believers in certain doctrines may be exempted from general state regulations.

ESTABLISHMENT OF RELIGION

What Does it Mean?

Provides that a state or federal government shall not

- *establish an official state religion;*
- *prefer one religion over another or aid one or all religions;*
- *inhibit worship according to individual preferences or conscience;*
- *levy taxes in any amount, to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt for teaching and the practice of religion.*

An important fact to keep in mind is that the Court is never interested in the "truth" or "accuracy" of any religious doctrine. The key case is *United States v. Ballard* (1944), involving the conviction of members of the "I Am" movement for mail fraud. The sect claimed that its members had been chosen as "divine" messengers of "Saint Germaine," and as such had the power to heal. The Court barred submission to the jury of any statements bearing on the veracity of their beliefs. Mr. Justice Douglas held that under the First Amendment, "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs . . . If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom." Final Amendment jurisprudence is content neutral; its rights and limitations can be applied to all groups, for to single out any one faith for special treatment would be to violate the spirit of the law itself.

The Court's first encounter with the establishment clause came in *Everson v. Board of Education* (1947), which by a five-to-four vote upheld a New Jersey statute permitting the transportation of parochial school students on public school busses. (Document 12) In his opinion, Mr. Justice Black reviewed the history and justification of the disestablishment movement in the United States, including Madison's Memorial and Remonstrance and Jefferson's Bill for Religious Liberty. The intent of the Framers of the First Amendment was, in Jefferson's words, "to erect a wall of separation between church and State." But Black found no breach of that wall, for the purpose of the statute was not to promote one or more religions above others, but to aid students in their education. The minority, fearing that such a step would only be an opening wedge to break down the wall, believed that the aid went far beyond what a state could legitimately offer religious institutions. "Certainly the fire department must not stand idly by while the church burns," wrote Mr. Justice Rutledge, but neither should the state help in any way to promote the goals of a religious movement.

Mr. Justice Douglas, in the majority in *Everson*, ultimately found the dissenting view persuasive, so that he helped form a new majority in other cases involving various forms of public aid to religious institutions. Over the years, the Court has struck down "released time" for religious instruction in the public schools (*McCullum v. Board of Education* [Document 13]), although permitting schools to dismiss students early for religious instruction off school grounds (*Zorach v. Clauson* [Document 14]); it invalidated a Pennsylvania statute reimbursing non-public schools for teacher salaries, textbooks and instructional materials, even if used solely for "secular" purposes (*Lemon v. Kurtzman* [1971]), a similar New York law reimbursing schools for certain "secular expenses" (*Levett v. Committee for Public Education* [1973]), and Pennsylvania's second effort to help religious schools, because the Court ruled that in parochial schools, there is often no line demarcating secular from religious instruction (*Meeks v. Pittenger* [1975]).

FREE EXERCISE OF RELIGION

What Does it Mean?

- *Freedom of conscience*
- *Freedom of mind and spirit*
- *Freedom of the individual from compulsion as to what he or she shall think or what they shall say*
- *Right of the individual to worship*
- *Right of each church to exist as an organization without government approval or assistance*

More recently the Court seemed to have softened this attitude by allowing some state aid to religious schools to cover secular subject textbooks (*Board of Education v. Allen* [1968]); for some secular functions provided a clear audit procedure was followed to ensure that no money went for religious purposes (*Wolman v. Waters* [1977]); and to cover the costs of state-required testing and reporting procedures (*Committee for Public Education and Religious Liberty v. Regan* [1980]). In general, the Court seemed to say that state laws designed solely to benefit the child, and which would not further religious purposes, are constitutional. Some observers thought the Court had gone too far in that direction when in 1983 it sustained a Minnesota law allowing citizens to deduct part of the cost of sending their children to private or parochial schools from their state income taxes (*Mueller v. Allen*).

The Court has also drawn a distinction between secondary and higher education, on the grounds that college students are more mature and thus less easily "indoctrinated" by religious activities, and that it is also easier to draw the line between religious and secular activities in a university. It thus upheld federal construction grants to church-related colleges for buildings of a solely secular nature, such as dormitories (*Tilton v. Richardson* [1971]). Similar state programs involving state-issued bonds (*Hunt v. McNair* [1973]) and categorical grants (*Roemer v. Maryland Public Works Board* [1976]) also received Court sanction. In its most recent term, however, the Court evidently felt it had gone far enough in this direction, and struck down New York and Michigan statutes providing public school teachers for remedial instruction in parochial schools; *Grand Rapids School District v. Ball* (Document 15) and *Aguilar v. Felton* (1985).

In all these cases, the Court adhered to a tripartite test first enunciated in the *Lemon* case: For state aid to religious schools to be constitutionally permissible: (1) it must have a secular legislative purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive government entanglement with religion. Although this test seems straightforward enough, in practice it often takes on the semblance of the serpentine wall, with both the majority and minority invoking the test to support their arguments.

In *Committee for Public Education and Religious Liberty v. Regan* (1980), for example, the majority upheld a New York law reimbursing church-related and private schools for the costs of standardized testing and reporting services mandated by the state. The majority, speaking through Mr. Justice White, found that this reimbursement met the three prongs of the test. It had a secular purpose, in that the state needed data on pupil performance. The majority did not believe the amount of money large enough to advance religion, and the procedures appeared simple enough to avoid government entanglement. The minority, Justices Blackmun, Brennan and Marshall, appealed to the same test. While conceding the secular legislative purpose, they contended that the amount of money involved would underwrite a significant enough portion of total personnel costs as to constitute an "advancement" of religion. Since the state would expend some ten million dollars, they also believed that the required auditing would lead to excessive entanglement.

As Justice White admitted, there is no "litmus-paper test to distinguish permissible from impermissible aid. . . . [Establishment Clause] cases are not easy; we are divided among ourselves. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility." While flexibility is certainly a virtue, however, the Court approach does make it difficult to understand how the Court reaches its decisions.

Purists argue that under the tripartite test, no state aid could ever meet constitutional scrutiny. Money given for secular purposes always aids religious purposes, for it frees up monies which would have been required to pay for the secular instruction and which can now support religious programs. Proper accounting procedures, and the strict rules of accountability, would also bring government into too close a relation with religious bodies. The Supreme Court, however, has declined to take so absolute an approach, but has tried to balance the strict ideals of total separation with the proposed benefits to students, recognizing that in a pluralist society such as ours, there is a positive role for parochial schools to play. But there is no bright line test, and there will no doubt be future cases testing the means by which legislatures, responding to interest group pressure, will try to aid religious schools without breaching the by-now serpentine wall of separation.

Public aid is one strand of establishment clause cases; a far more controversial area involves state sanction of specific religious practices. The leading case is certainly *Engel v. Vitale* (1962), which struck down a New York Regents "non-denominational" prayer mandated for use in public schools. (Document 16) Mr. Justice Black saw a clear violation of the establishment clause, for imposed prayer of any sort smacked of governmental compulsion. Few cases have ever aroused public sentiment as much as the school prayer decision, for it seemed to many people that the Court had gone well beyond the First Amendment's prohibition against the establishment of a religion to deny the very idea of religion, or of God, any place in public education. Mr. Justice Stewart in his dissent argued that the New York practice merely recognized "the deeply entrenched and highly cherished spiritual tradition of our Nation."

The Court triggered further protest two years later in *Abington School District v. Schempp*, when it ruled that the First Amendment also prohibited the public reading of the Lord's Prayer and verses from the Bible, even if dissenting students were excused. (Document 17) In his opinion, Mr. Justice Clark also went back to the Virginia experience to develop the idea of total state neutrality in the area of religion. To require students to read from the Bible, not as a study of religion or literature, constituted a religious exercise. The fact that a majority of the population approved did not matter; the First Amendment was not designed to implement the will of the majority, but to protect the rights of minorities.

Here indeed is one of the key ideas of religious liberty, that although the majority is free to practice its religion, it may not use the instrumentalities of the state to impose these beliefs on others. The state must be neutral.

Neutrality, however, is at times a difficult concept to define. For the devout, neutrality may appear as hostility, while for the non-believer, any aid may seem to be too much. The Court has not always been consistent, because we as a people are far from consistent. As Mr. Justice Douglas noted, "We are a religious people," and our traditions are not always religiously neutral. Congress and state legislatures often begin their sessions with a prayer, and the Court upheld this practice in *Marsh v. Chambers* (1982),

even though the Nebraska legislature paid a chaplain out of state funds. Christmas, one of the holiest days in the Christian calendar, has become a secular holiday as well, with religious symbols displayed on public grounds and in store fronts, a practice so ubiquitous that the Court found no constitutional ban to the presence of a crèche in a public park (*Lynch v. Donnelly* [1984]). The idea of a sabbath is religious in origin, yet many states enforce Sunday closing laws, and the Court has ruled such regulations do not violate the First Amendment (*McGowan v. Maryland* [1961]). Yet when Massachusetts gave churches an effective veto over granting liquor licenses within 500 feet of a church building, the Court said the state had gone too far (*Larkin v. Grendel's Den* [1982]).

If one has difficulty in delineating the proper line of neutrality in the establishment clause cases, the task grows no easier when we seek a clear test in the free exercise cases. The earliest rule, dating to the Mormon case of 1878, drew a distinction between belief and conduct, granting the former absolute protection, but limiting the latter to those actions which were socially acceptable. Thus, in the *Draft Cases* (1918), the Court unanimously rejected challenges to World War I draft laws on religious grounds; the social imperative of a nation at war demanded the registration of all eligible males. Even in peacetime, a state regulation that all male students at state-sponsored colleges take military science courses was upheld against protests that it violated the religious beliefs of conscientious objectors (*Hamilton v. Regents* [1934]).

In 1940, the Court refined the belief/action rule in *Cantwell v. Connecticut*. Mr. Justice Roberts acknowledged that the freedom to act could not be absolute, but also noted that freedom of religion "embraces two concepts, freedom to believe and freedom to act." If one cannot carry out one's beliefs (within reason), then in effect the beliefs themselves are circumscribed. The free exercise cases since then have been an effort to strike a balance between the greatest possible leeway for action motivated by religious belief, and the need of the state to preserve order and civil peace.

How difficult this balancing is can be seen in the two flag salute cases, which also show the interconnectedness of the speech and religion clauses of the First Amendment. Jehovah's Witnesses, who have helped forge a large portion of the free exercise jurisprudence, objected to a Pennsylvania statute requiring students to salute the American flag. The Witnesses took the biblical command against worship of graven images literally, and to them the flag salute violated their religious beliefs. Mr. Justice Frankfurter wrote the majority opinion in the first case, *Minersville School District v. Gobitis* (1940), and rejected the free exercise claim. "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." Frankfurter recognized the dilemma between majority power and minority rights, but he thought the interest of the state in fostering patriotism a legitimate goal, especially with part of the world already at war, and with a real possibility that the United States would soon be involved. "National unity is the basis of national security," he declared, since "the ultimate foundation of a free society is the binding tie of cohesive sentiment." Only Mr. Justice Stone dissented (Document 20).

The Court has changed its mind in the past, but rarely in so dramatic a way and with such rapidity. Within three years, an eight-to-one majority disappeared; two justices retired, and three others changed their opinions. In part, the *Gobitis* opinion, reflecting the rampant nationalism of the day, went against many precedents protecting the rights of minorities. Also, the continued resistance of the Witnesses to the flag salute led to numerous assaults on them, which causes the justices to recognize the dangers of unfettered majority power. In *West Virginia State Board of Education v. Barnette* (1943), the Court overruled *Gobitis*, and found that no clear and present danger (the traditional test for determining when freedom of speech could be limited) existed to warrant the state's action.

Mr. Justice Jackson, in one of his most forceful opinions, found the central issue to be less one of religious liberty than of freedom of expression. "Many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual." Then in an oft-quoted passage he declared: "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . . [If] there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (Document 21)

The flag salute decisions initiated a new standard by which to judge free exercise cases, and which eventually expanded to cover speech, civil rights, and civil liberties as well. Justices Douglas and Black would later argue for a "preferred" position for First Amendment rights, claiming that they represented a higher rung on the ladder of constitutionally guarantied rights. While the entire Court has never fully endorsed this view, it has in practice adopted a double standard. When economic liberties are involved, such as restrictions on how one may conduct business (i.e., minimum wages, maximum hours, antitrust, etc.), the Court applies a "rational basis" test: Does the Congress under its commerce power, or the state legislatures under their police powers, have a reasonable justification for imposing such rules? If the answer is yes, the Court will enquire no further.

But in First Amendment areas, rational basis is not enough, and the Court imposes a "strict scrutiny." Does the state or federal government have a compelling state need which is of such importance that it is warranted in limiting fundamental rights? The state must prove that a crucial social need will suffer unless the right is limited, and the limitation must be content-neutral, specific, and aimed at the problem. A war, for example, may justify some restriction on speech, or, in Mr. Justice Holmes's famous statement, "There is no right to cry 'fire' in a crowded theater." But, especial-

ly in the free exercise area, there is a heavy burden on the government to prove the existance of an overriding need.

It is not an impossible burden, and the belief/action dichotomy has allowed the Court to sustain a variety of state regulations challenged by religious groups. The Jehovah's Witnesses were in court again in 1944 protesting a Massachusetts law forbidding a female minor to sell newspapers, periodicals or merchandise in public places.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . .

First Amendment Clauses

The girl claimed it was her religious duty to perform the work, but the Court found the state had a legitimate interest in limiting such activities by children (*Prince v. Massachusetts*). Similarly, Jewish merchants attacked the Sunday closing laws on the grounds that their religion forbade them to work on Saturday, and the laws impaired their ability to earn a livelihood. The Court said the laws did not impinge on their religious beliefs by requiring them to work on Saturdays, and the state's interest in securing a common day free from commercial noise and tension did not impede their beliefs (*Braunfield v. Brown* [1961]).

Modern cases rarely deal with the state requiring a citizen to act in a manner contrary to his or her beliefs; rather, they raise the more complex issue of when is religiously directed conduct exempt from general state regulations which nominally have no religious impact. Does the state unwittingly impose a burden, directly or indirectly, on a group holding unorthodox views? Although the Court will not inquire into the "truth" of dissenting beliefs, it often has to examine the content to see whether the objections are legitimate. If one religious group is then exempted from a regulation, does this somehow imply that the state has transgressed the neutrality standard of the establishment clause? All this is a long way from Mr. Jefferson's "I never told my own religion, nor scrutinized that of another." Scrutiny, close scrutiny, becomes the key to determining when the free exercise clause has been violated.

The South Carolina unemployment insurance program barred benefits to workers who failed, without good cause, to accept suitable work when offered. A member of the Seventh-day Adventists lost her job when she refused to work on Saturday, that denomination's Sabbath, and the state refused her claim for unemployment compensation. The Court found that the state's decision violated the woman's right to free exercise, since it placed her in the dilemma of either following the dictates of her conscience or losing needed benefits. South Carolina did not impose this burden on those with Sunday worship, and had no compelling interest in discriminating against Saturday observers. Moreover, by favoring those who regarded Sunday as the Sabbath, the state also violated the neutrality requirement of the establishment clause (Document 22).

Perhaps one modern case which Jefferson and Madison would have intuitively applauded came in 1972, when the Court struck down provisions of Wisconsin's compulsory school attendance law as it affected the Amish, who believed that sending their children to public schools would endanger their souls and salvation. As Chief Justice Burger wrote, the law raised "a very real threat of undermining the Amish community and religious practices as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant religion. Enforcement . . . would gravely endanger if not destroy the free exercise of respondents' religious beliefs." Burger recognized that exempting the Amish would create an exception to the neutrality principle, but he tipped the scales in favor of the Amish and the free exercise of their beliefs (Document 23).

The Amish case, *Wisconsin v. Yoder*, is a direct descendant not only of Jefferson's and Madison's views that the state should not interfere with individual religious beliefs, but of the Court's own sensitivity to the needs of minorities; it is one of the glorious landmarks in the two hundred year history of Mr. Jefferson's idea. Probably no other group has resisted modernity as have the Amish; by almost any standard, except their own, they are out of step with the temper of our times. They constitute but a tiny fraction of the population in a handful of states, and they called into question one of the hallmarks of American society, compulsory schooling. Yet when they appealed for aid, the nation's highest court, invoking the majesty of the First Amendment, granted them relief.

A final area to examine, and one where the Court has had a difficult task in forging clear standards, involves conscientious objectors. Federal statutes have traditionally exempted conscientious objectors, who oppose "war in any form" on religious grounds, from all or some military service, and the Court long held such exemptions a matter of legislative grace, not a constitutional right. In fact, in the World War I *Draft Cases*, the Court had refused even to entertain a First Amendment challenge. During the Second World War, the problem of conscientious objectors received serious, and for the most part sympathetic, attention from the government. This resulted in a broader exemption embodied in the 1948 draft law, which now defined "religious training or belief" as a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal code." The section drew almost immediate fire as a violation of the establishment, free exercise, and due process clauses, because it failed to exempt non-religious objectors, and discriminated among the various forms of religious expression.

The Court has thrice evaded the constitutional issues when the law came before it. First it interpreted the reference to religion so broadly that almost any one could avail himself of the coverage (*United States v. Seeger* [1965]). Then it read the word "religion" into the "personal code" part so as to include non-religious objectors (*Welch v. United States* [1970]). But the Court refused to allow selective objection; one

had to oppose "war in any form," not just particular conflicts such as Vietnam, which the protestor claimed he opposed on religious grounds as an "unjust" war (*Gillette v. United States* [1971]). While the latter two cases abounded with references to the free exercise clause, the Court wisely avoided a sweeping declaration of policy.

CONCLUSION

The line from the Statute of Virginia for Religious Freedom to the most recent decisions of the nation's highest court has not always been straight and well-defined, but the march has been steadily away from any governmental involvement with religion and toward the greatest possible freedom of individual conscience. Yet religion is not, and cannot be, totally separated from secular affairs, because it touches upon important questions of ethics and morality. For many people, the absence of religion in political affairs is a condition to lament, for they see modern ills as stemming from the abandonment of traditional religious values. The Court's rulings against compulsory prayer, Bible readings and creationism, and in favor of abortion (*Roe v. Wade* [1973]), strike them as a distortion of constitutional doctrine, as do the rulings limiting state assistance to religious education. The Attorney General of the United States, in an unusual attack, denounced the Court at the end of its last session for a "mistaken understanding of constitutional theory" regarding the religion clauses, and charged the justices with departing from the original intent of the Founding Fathers.

Reliance on "original intent" is, of course, a basic tenet of constitutional adjudication, but it is only one means by which we interpret and re-interpret the Constitution and the Bill of Rights to determine their applicability to contemporary affairs. As Mr. Justice Holmes said, the Constitution is not a straight-jacket, but a suit of clothes, and it has to allow for growth and movement. In the area of religious freedom, however, the Founding Fathers made clear that they wanted a wall of separation between church and state; they saw religion as essentially a matter of individual conscience, free from majoritarian pressures. Of all the freedoms they bequeathed us, none save free speech has been so important in making this country a bastion of liberty. The wall may at times appear serpentine, and there have been some breaches, but it still stands, a monument not only to Jefferson, Madison and Mason, but to the Baptists and other dissenting sects who began the struggle for religious freedom over two centuries ago. In that struggle, which continues in our time albeit in somewhat different form, the words of the Virginia Statute for Religious Freedom still ring clear, a message relevant not only to the citizens of the Commonwealth, but to the world. ■

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Document 1. The Virginia Statute for Religious Freedom (1786)

The Virginia Statute for Religious Freedom resulted from decades of agitation by dissenting sects, especially the Baptists, against the establishment of the Church of England in the Commonwealth. The Tory bias of the Church led to a steep decline in its influence during the Revolution, and with the support of Thomas Jefferson, James Madison, George Mason and others, the legislature enacted the bill on January 16, 1786. Jefferson thought this one of his most important contributions to the public weal, and asked that it be inscribed on his tombstone, along with his authorship of the Declaration of Independence and his founding of the University of Virginia.

* * *

Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right; that it tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural

weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them:

Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

And though we well know that this assembly elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.

Document 2. The Northwest Ordinance (1787)

Here again the Jeffersonian influence is clear, although by this time Jefferson was minister to France. The larger states, including Virginia, New York and Massachusetts had agreed, in return for the smaller states ratifying the Articles on Confederation, to cede their claims to the "western reserve" to the nation. In the land ordinances of 1785 and 1787, Congress established the basic rules for creating new states out of territories; perhaps most important, it set down the principle that the new states would be equal to the older ones, and even while territories, would enjoy full civil liberties. Since by then most states had adopted some guaranty of religious freedom, Congress extended this right to the settlers of the Northwest Territory as well.

* * *

And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory. . . .

It is hereby ordained and declared. . . . that the following articles shall be considered as articles of compact between the original States and the people and the States in said territory, and forever remain unalterable, unless by common consent, to wit:

Article I. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.

Article III. Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. . . .

Article V. . . . The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles . . . .

Document 3. Edmund Randolph in the Virginia Ratification Convention (1788)

Randolph, a former governor of the Commonwealth, actually departed from many of his colleagues in stating his belief that the Constitution, even without a Bill of Rights, would provide sufficient protection for religious liberty. In Virginia and most states, however, the general sentiment was that a Bill of Rights was necessary.

* * *

Freedom of religion is said to be in danger. I will candidly say, I once thought that it was, and felt great repugnance to the constitution for that reason. I am willing to acknowledge my apprehensions removed—and I will inform you by what process of reasoning I did remove them. The constitution provides, that "the senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath, or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States." It has been said, that if the exclusion of the religious test were an exception from the general power of congress, the power over religion would remain. I inform those who are of this opinion, that no power is given expressly to congress over religion. The senators and representatives, members of the state legislatures, and executive and judicial officers, are bound by oath, or affirmation, to support this constitution. This only binds them to support it in the exercise of the powers constitutionally given it. The exclusion of religious tests is an exception from this general provision, with respect to oaths, or affirmations. Although officers, &c. are to swear that they will support this constitution, yet they are not bound to support one mode of worship, or to adhere to one particular sect. It puts all sects on the same footing. A man of abilities and character, of any sect whatever, may be admitted to any office or public trust under the United States. I am a friend to a variety of sects, because they keep one another in order. How many different sects are we composed of throughout the United States? How many different sects will be in congress? We cannot enumerate the sects that may be in congress. And there are so many now in the United States that they will prevent the establishment of any one sect in prejudice to the rest, and will forever oppose all attempts to infringe religious liberty. If such an attempt be made, will not the alarm be sounded throughout America? If congress be as wicked as we are foretold they will, they would not run the risk of exciting the resentment of all, or most of the religious sects in America.

Document 4. A Declaration of Certain Fundamental Rights and Liberties of the Protestant Episcopal Church of Maryland (1790)

As one state after another disestablished what had been the dominant church, the leaders of these churches feared that the so-called "democratic sentiment" might lead to worse travails, such as the loss of autonomy and property as well as previous privileges. Ministers of the Maryland Episcopalian Church (formerly the established Church of England), demanded as their right that their church be treated fairly and on an equal basis will all other Christian churches, and not be singled out for any specific penalties.

* * *

Whereas, by the Constitution and Form of Government of this State, "All persons, professing the Christian Religion, are equally entitled to protection in their religious liberty, and no person, by any law (or otherwise), ought to be molested in his person, or estate, on account of his religious persuasion or profession, or for his religious practice; unless, under color of religion, any man shall disturb the good order, peace, or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil, or religious rights:" And *whereas*, the ecclesiastical and spiritual independence of the different religious Denominations, Societies, Congregations and Churches of Christians in this State, necessarily follows from, or is included in, their civil independence:

Wherefore, we the Clergy of the Protestant Episcopal Church of Maryland (heretofore denominated the Church of England, as by law established), with all duty to the civil authority of the State, and with all love and good will to our fellow Christians of every other religious denomination, do hereby *declare, make known* and *claim* the following, as certain of the *fundamental Rights and Liberties* inherent in, and belonging to, the said Episcopal Church, not only of common right, but agreeably to the express words, spirit and design, of the Constitution and Form of Government aforesaid, viz.:

I. We consider it as the undoubted right of the said Protestant Episcopal Church, in common with other Christian Churches under the American Revolution, to complete and preserve herself as an entire Church, agreeably to her ancient usages and profession, and to have the full enjoyment and free exercise of those purely spiritual powers, which are essential to the being of every Church or Congregation of the faithful, and which, being derived only from CHRIST and His Apostles, are to be maintained, independent of every foreign, or other, jurisdiction, so far as may be consistent with the civil rights of society.

II. That ever since the Reformation, it hath been the received doctrine of the Church whereof we are members (and which, by the Constitution of this State, is entitled to the perpetual enjoyment of certain property and rights under the denomination of the CHURCH OF ENGLAND), "That there be these three orders of Ministers in CHRIST'S Church; Bishops, Priests, and Deacons," and that an Episcopal Ordination and Commission are necessary, to the valid administration of the Sacraments, and the due exercise of the Ministerial Functions, in the said Church.

III. That, without calling in question the Rights, Modes, and Forms, of any other Christian Churches or Societies, or wishing the least contest with them on that subject, we consider and *declare* it to be an essential right of the said Protestant Episcopal Church, to have and enjoy the continuance of the said three Orders of Ministers forever, so far as concerns matters purely spiritual; and that no persons, in the character of Ministers, except such as are in the communion of said Church and duly called to the Ministry by regular Episcopal Ordination, can or ought to be admitted into, or enjoy, any of the "Churches, Chapels, Glebes, or other property," formerly belonging to the Church of England, in this State, and which, by the Constitution and Form of Government, is secured to the said Church forever, by whatsoever name she, the said Church, or her superior Order of Ministers, may, in future be denominated.

IV. That, as it is the right, so it will be the duty, of the said Church, when duly organized, constituted and represented, in a *Synod* or *Convention*, of the different Orders of her Ministry and People, to revise her Liturgy, Forms of Prayer, and Publick Worship, in order to adapt the same to the late Revolution, and other local circumstances of America; which, it is humbly conceived, may and will be done, without any other or farther departure from the venerable Order and beautiful Forms of Worship of the Church from whence we sprung, than may be found expedient in the change of our situation from a Daughter to a Sister Church.

The foregoing Declaration was made in a Convention of the Clergy of this Church, held at Annapolis, on the Thirteenth day of August, in the year of our Lord 1783; and recognized and confirmed in Convention of the Clergy and Lay Delegates at Easton, on the Thirty-first day of May, in the year of our Lord, 1790: And signed, Attest:

John Bissett, Secretary — William West, President

Document 5. Selected Clauses on Religious Freedom from State Constitutions

Even before the Federal government adopted its Bill of Rights in 1791, many of the states had already incorporated some basic guaranties of individual liberty into their constitutions. The following clauses date from 1780 to 1901, and indicate the steady spread of Mr. Jefferson's idea.

* * *

ARTICLE I. DECLARATION OF RIGHTS

Sec. 3. Religious freedom. That no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination or mode of worship; that no one shall be compelled by law to attend any place of worship; nor to pay any

tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust under this state; and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles.

ARTICLE II. BILL OF RIGHTS

Sec. 4. Religious freedom. The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

ARTICLE VII. OF RELIGION

Sec. 1. Compulsory support of religion prohibited; all denominations of Christians to have equal rights. It being the duty of all men to worship the Supreme Being, the Great Creator and Preserver of the Universe, and their right to render that worship, in the mode most consistent with the dictates of their consciences; no person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church or religious association. But every person now belonging to such congregation, church, or religious association shall remain a member thereof until he shall have separated himself therefrom, in the manner hereinafter provided. And each and every society or denomination of Christians in this state, shall have and enjoy the same and equal powers, rights and privileges; and shall have power and authority to support and maintain the ministers or teachers of their respective denominations, and to build and repair houses for public worship, by a tax on the members of any such society only, to be laid by a major vote of the legal voters assembled at any society meeting, warned and held according to law, or in any other manner.

Sec. 2. Right to separate from Christian societies or denominations. If any person shall choose to separate himself from the society or denomination of Christians to which he may belong, and shall leave a written notice thereof with the clerk of such society, he shall thereupon be no longer liable for any future expenses which may be incurred by said society.

ARTICLE II. BILL OF RIGHTS

Sec. 3. Religious freedom. The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right; privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious denomination or mode of worship.

ARTICLE VII. EDUCATION

Sec. 3. Public funds for sectarian purposes forbidden. Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.

ARTICLE IX. REVENUE

Sec. 3. Tax exemptions. The property of the State, counties, and other municipal corporations, both real and personal, and such other property, as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. . . .

PART THE FIRST. A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH OF MASSACHUSETTS

ARTICLE II. Right and duty of public religious worship; protection therein. It is the right as well as the Duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and preserver of the Universe. And no Subject shall be hurt, molested, or restrained, in his person, Liberty, or Estate, for worshipping God in the manner and season most agreeable to the Dictates of his own conscience, or for his religious profession or sentiments; provided he doth not Disturb the public peace, or obstruct others in their religious Worship.

ARTICLE III. Legislature empowered to compel provision for public worship. As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a Community, but by the institution of the public Worship of God, and of public instructions in piety, religion and morality: Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this Commonwealth have a right to invest their legislature with power to authorize and require, and The legislature shall, from time to time, authorize and require the several Towns, Parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own Expense, for the institution of the Public worship of God, and for the support and maintenance of public protestant teachers of piety, religion and morality, in all cases where such provision shall not be made Voluntarily.—And the people of this Commonwealth have also a right to, and do, invest

their legislature with authority to enjoin upon all the Subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can Conscientiously and conveniently attend—Provided notwithstanding, that the several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at all times, have the exclusive right of electing their public Teachers, and of contracting with them for their support and maintenance.—And all monies, paid by the Subject to the Support of public worship, and of the public teachers aforesaid shall, if he require it, be uniformly applied to the support of the public teachers of his religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said monies are raised—And every denomination of Christians, demeaning themselves peaceably, and as good Subjects of the Commonwealth, shall be equally under the protection of the Law: And no subordination of any one sect or denomination to another shall ever be established by law.

ARTICLE XVIII. Moral qualifications for office; moral obligations of law-givers and magistrates. A frequent recurrence to the fundamental principles of the constitution and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty,and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their Officers and Representatives; and they have a right to require of their law-givers and magistrates an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the Commonwealth.

ARTICLE I. DECLARATION OF RIGHTS

Sec. 26. Religious liberty. All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience.

ARTICLE V. REVENUE AND TAXATION

Sec. 5. Property exempt from taxation. Property belonging to the State or to municipal corporations, shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable, or religious purposes; . . .

ARTICLE VI. SUFFRAGE AND ELIGIBILITY TO OFFICE

Sec. 8. Disqualification for office. The following classes of persons shall be disqualified for office: first, all persons who shall deny the being of Almighty God . . . .

Document 6. Argument of Counsel in Defense of Seal of Confession (1813)

The facts of this case are set out in the text, but it is interesting to note that Richard Riker, the Protestant lawyer who defended Father Kohlmann, set out his argument in the broadest possible terms of free exercise. By the early nineteenth century, therefore, at least some people who thought about what religious freedom meant had reached the essentially modern position.

* * *

Having thus stripped the cause of embarrassment, and shown, I trust, to the satisfaction of your Honours, that this Court is at perfect liberty, in the judgment that it shall finally pronounce in this cause, to follow the guidance of liberality and wisdom, unfettered by authority; I shall proceed to examine the first proposition which I undertook to maintain, that is, that the 38th Article of the Constitution, protects the Reverend Pastor in the exemption which he claims, *independent of every other consideration.*

The whole article is in the words following:

"And whereas we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance, wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind: This convention doth further, in the name and by the authority of the good people of this state, ORDAIN, DETERMINE AND DECLARE, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state to all mankind. *Provided*, that the liberty of conscience hereby granted, shall not be so construed, as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."

Now we cannot easily conceive of more broad and comprehensive terms, than the convention have used. Religious liberty was the great object which they had in view. They felt, that it was the right of every human being, to worship God according to the dictates of his own conscience. They intended to secure, forever, to all mankind, without distinction or preference, the free exercise and enjoyment of religious profession and worship. They employed language commensurate with that object. It is what they have said.

Again, the Catholic religion is an ancient religion. It has existed for eighteen centuries. The sacrament of penance has existed with it. We cannot in legal decorum, suppose the convention to have been ignorant of that fact: nor were they so in truth. The convention was composed of some of the ablest men in this or in any other nation. Their names are known to the court. A few still live, and we revere the memories of those who are no more. They all knew the Catholic faith, and that auricular confession was a part of it. If they had intended any exception would they not have made it? If they had intended that the Catholics should freely enjoy their religion, excepting always, auricular confession, would they not have said so? By every fair rule of construction we are bound to conclude that they would have said so:—And as the convention did not make the exception neither ought we to make it.

Again there is no doubt that the convention intended to secure the liberty of conscience.—Now, where is the liberty of conscience to the Catholic, if the priest and the penitent, be thus exposed? Has the priest, the

liberty of conscience, if he be thus coerced? Has the penitent the liberty of conscience, if he is to be dragged into a court of justice, to answer for what has passed in confession? Have either the privilege of auricular confession? Do they freely enjoy the sacrament of penance? If this be the religious liberty, which the constitution intended to secure—it is as perplexing as the liberty which, in former times, a man had of being tried by the water ordeal, where, if he floated he was guilty—if he sunk he was innocent. . . .

I confess I feel a deep interest in this cause. I am anxious that the decision of the Court should be marked with liberality and wisdom. I consider this a contest between toleration and persecution. A contest involving the rights of conscience. A great constitutional question, which as an American Lawyer, I might, with strict right and perfect propriety have discussed, independent of adjudged cases. To compel the Reverend Pastor to answer, or to be imprisoned, must either force his conscience or lead to persecution. I can conceive of nothing, more barbarous—more cruel—or more unjust than such an alternative. To compel him to answer, against his religious faith or to confine his person, would be the highest violation of right that I have ever witnessed. It would cast a shade upon the jurisprudence of our country. The virtuous and the wise, of all nations, would grieve that America should have so forgotten herself, as to add to the examples of religious despotism!

I cannot express my convictions on this important and delicate subject, better than in the language of that enlightened judge [Lord Mansfield] whose opinion I before quoted. "Conscience is not controllable by human laws, nor amenable to human tribunals. Persecution or attempts to force conscience, will never produce conviction, and are only calculated to make hypocrites, or—Martyrs."

"There is nothing, certainly, more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian Religion, more iniquitous and unjust, more impolitic than PERSECUTION. It is against natural religion, revealed religion, and sound policy."

Thus have I closed a subject of vast interest to the parties concerned. I could have wished that my argument had been more perfect, and more persuasive. The learned counsel however who is associated with me will more than supply its defects. It only remains for me to make my acknowledgments to the court for the very attentive hearing which it has been pleased to give me, and to express the entire confidence which my reverend client feels, in the wisdom and in the purity of those, to whose judgment he now cheerfully submits himself.

Document 7. Thomas Kennedy Seeking Equal Rights for Jews of Maryland (1818)

Ironically Maryland, which had been founded as a refuge for persecuted Catholics, was among the last to do away with restrictions on religious minorities. But there as elsewhere, leaders in the fight for religious equality could be found in the Protestant majority. Kennedy's argument also has the ring of the modern about it, in his claim that persecution of any one group represents a danger to all minorities.

* * *

It is with feelings of no ordinary kind, that I now rise to address this honourable house; the Bill which we are called to decide upon, is, in my estimation, the most important that has yet come before us; the most important that will come before us during the present session.

And, if I am asked why I take so much interest in favour of the passage of this Bill—to this I would simply answer, because I consider it my DUTY to do so. There are no Jews in the county from whence I come, nor have I the slightest acquaintance with any Jew in the world. It was not at their request; it was not even known to any of them, that the subject would be brought forward at this time.

And if there is any merit in bringing the case of these oppressed people before this house, that merit does not belong to me; I wish not to enjoy honours that I do not deserve, nor wear laurels that I have not earned. The subject was mentioned to me in Baltimore during the last session, not by a Jew, but by a Gentile gentleman. My situation was then like that of many of the people of Maryland . . . [I was faced with] a subject indeed that had never until that time occupied a moment's reflection in my mind; but the moment it was mentioned, I was convinced that such distinctions were wrong and that they ought to be abolished forever.

It is well known to most of the members of this House that I am not a public speaker. Never before the last session of the Legislature did I ever venture to address a public assembly; yet although I know little of law and less of logic, and although I am master of no language but that which my mother taught me, on this occasion I am not afraid to meet any opponent, let his talents, learning and eloquence be what they may; and even if my frail vessel should meet with a storm, or suffer shipwreck on this voyage, I see many a friendly hand around me, who will not suffer the unskillful pilot to perish.

There is only one opponent that I fear at this time, and that is PREJUDICE—our prejudices, Mr. Speaker, are dear to us, we all know and feel the force of our political prejudices, but our religious prejudices are still more strong, still more dear; they cling to us through life, and scarcely leave us on the bed of death, and it is not the prejudice of a generation, of an age or of a century, that we have now to encounter. No, it is the prejudice which has passed from father to son, for almost eighteen hundred years. . . .

. . . There are few Jews in the United States; in Maryland there are very few, but if there was only one—to that one, we ought to do justice. I have already observed that I have no acquaintance with any of them, but I have good authority for saying, that those among us are worthy men, and good citizens; and during the late war, when Maryland was invaded, they were found in the ranks by the side of their Christian brethren fighting for those who have hitherto

denied them the rights and privileges enjoyed by the veriest wretches. . . .

Document 8. Joseph Story on the Religion Clauses of the First Amendment (1833)

Next to John Marshall, Joseph Story ranks as the most influential member of the United States Supreme Court in the first half of the nineteenth century, and his Commentaries *have long been considered one of the definitive interpretations of early constitutional thought. Yet Story represents an older and now discredited view that government can and should interfere to promote religiosity, and he also assumes that all one has to be concerned about are Christian sects. Although Story is explicit in his prohibitions against government involvement in particular religious affairs, he ignores non-Christian groups for the most part, seeming to assume that whatever would apply to the majoritarian Christian sects would apply to them as well.*

* * *

Let us now enter upon the consideration of the amendments, which, it will be found, principally regard subjects properly belonging to a bill of rights.

The first is, "Congress shall make no law" respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition government for a redress of grievances."

And first, the prohibition of any establishment of religion, and the freedom of religious opinion and worship.

How far any government has a right to interfere in matters touching religion, has been a subject much discussed by writers upon public and political law. The right and the duty of the interference of government, in matters of religion, have been maintained by many distinguished authors, as well as those, who were the warmest advocates of free governments, as those, who were attached to governments of a more arbitrary character. Indeed, the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice. The promulgation of the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues;—these never can be a matter of indifference in any well ordered community. It is, indeed, difficult to conceive, how any civilized society can well exist without them. And at all events, it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects. This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience.

The real difficulty lies in ascertaining the limits, to which government may rightfully go in fostering and encouraging religion. Three cases may easily be supposed. One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state. For instance, a government may simply declare, that the Christian religion shall be the religion of the state, and shall be aided, and encouraged in all the varieties of sects belonging to it; or it may declare, that the Catholic or Protestant religion shall be the religion of the state, leaving every man to the free enjoyment of his own religious opinions; or it may establish the doctrines of a particular sect, as of Episcopalians, as the religion of the state, with a like freedom; or it may establish the doctrines of a particular sect, as exclusively the religion of the state, tolerating others to a limited extent, or excluding all, not belonging to it, from all public honours, trusts, emoluments, privileges, and immunities.

Now, there will probably be found few persons in this, or any other Christian country, who would deliberately contend, that it was unreasonable, or unjust to foster and encourage the Christian religion generally, as a matter of sound policy, as well as of revealed truth. In fact, every American colony, from its foundation down to the revolution, with the exception of Rhode Island, (if, indeed, that state be an exception,) did openly, by the whole course of its laws and institutions, support and sustain, in some form, the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the states down to the present period, without the slightest suspicion, that it was against the principles of public law, or republican liberty. Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion, as the great basis, on which it must rest for its support and permanence, if it be, what it has ever been deemed by its truest friends to be, the religion of liberty.

Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

It yet remains a problem to be solved in human affairs, whether any free government can be permanent, where the public worship of God, and the support of religion, constitute no part of the policy or

duty of the state in any assignable shape. The future experience of Christendom, and chiefly of the American states, must settle this problem, as yet new in the history of the world, abundant, as it has been, in experiments in the theory of government.

The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.

Document 9. John Tyler on the Know-Nothings (1854)

Despite the hysteria of the mid-century nativist movement, the voice of reason could be found among many of the older leaders. In this letter to his son, the former President deplored what he considered unfounded bias against Catholics.

* * *

. . . The Catholics seem especially obnoxious to them, whereas that sect seems to me to have been particularly faithful to the Constitution of the country, while their priests have set an example of non-interference in politics which furnishes an example most worthy of imitation on the part of the clergy of the other sects at the North, who have not hesitated to rush into the arena and soil their garments with the dust of bitter strife. The intolerant spirit manifested against the Catholics, as exhibited in the burning of their churches, etc., will, as soon as the thing becomes fairly considered, arouse a strong feeling of dissatisfaction on the part of a large majority of the American people; for if there is one principle of higher import with them than any other, it is the principle of religious freedom . . . .

Document 10. Alfred E. Smith on Catholicism and Patriotism (1927)

The nativism of the Know-Nothings was reborn in the 1920s in the even more vicious form of the Ku Klux Klan, which attacked Blacks, Catholics, Jews and all other "foreigners" as un-American. The hysteria infected people who should have known better, and many people still claimed that Catholics took their orders from the Pope and could not be fully loyal Americans. This charge received wide circulation early in 1927 when it appeared certain that the Catholic governor of New York, Al Smith, would win the 1928 Democratic presidential nomination. Smith decided to meet the charge head-on in his response to Charles Marshall.

* * *

Dear Sir:

In your open letter to me in the April *Atlantic Monthly* you "impute" to American Catholics views which, if held by them, would leave open to question the loyalty and devotion to this country and its Constitution of more than twenty million American Catholic citizens. I am grateful to you for defining this issue in the open and for your courteous expression of the satisfaction it will bring to my fellow citizens for me to give "a disclaimer of the convictions" thus imputed. Without mental reservation I can and do make that disclaimer. These convictions are held neither by me nor by any other American Catholic, as far as I know. . . .

Taking your letter as a whole and reducing it to commonplace English, you imply that there is conflict between religious loyalty to the Catholic faith and patriotic loyalty to the United States. Everything that has actually happened to me during my long public career leads me to know that no such thing as that is true. I have taken an oath of office in this State nineteen times. Each time I swore to defend and maintain the Constitution of the United States. All of this represents a period of public service in elective office almost continuous since 1903. I have never known any conflict between my official duties and my religious belief. No such conflict could exist. Certainly the people of this State recognize no such conflict. They have testified to my devotion to public duty by electing me to the highest office within their gift four times. You yourself do me the honor, in addressing me, to refer to "your fidelity to the morality you have advocated in public and private life and to the religion you have revered; your great record of public trusts successfully and honestly discharged." During the years I have discharged these trusts I have been a communicant of the Roman Catholic Church. If there were conflict, I, of all men, could not have escaped it, because I have not been a silent man, but a battler for social and political reform. These battles would in their very nature disclose this conflict if there were any.

But, wishing to meet you on your own ground, I address myself to your definite questions, against which I have thus far made only general statements. I must first call attention to the fact that you often divorce sentences from their context in such a way as to give them something other than their real meaning. I will specify. . . . You quote from the *Catholic Encyclopedia* that my Church "regards dogmatic intolerance, not alone as her incontestable right, but as her sacred duty." And you say that these words show that Catholics are taught to be politically, socially, and intellectually intolerant of all other people. If you had read the whole of that article in the *Catholic Encyclopedia*, you would know that the real meaning of these words is that for Catholics alone the Church recognizes no deviation from complete acceptance of its dogma. These words are used in a chapter dealing with that subject only. The very same article in another chapter dealing with toleration toward non-Catholics contains these words: "The intolerant man is avoided as much as possible by every high-minded person. . . . The man who is tolerant in every emergency is alone

lovable." The phrase "dogmatic intolerance" does not mean that Catholics are to be dogmatically intolerant of other people, but merely that inside the Catholic Church they are to be intolerant of any variance from the dogma of the Church.

Similar criticism can be made of many of your quotations. But, beyond this, by what right do you ask me to assume responsibility for every statement that may be made in any encyclical letter? As you will find in the *Catholic Encyclopedia* (Vol. V p. 414), these encyclicals are not articles of our faith. The Syllabus of Pope Pius IX, which you quote on the possible conflict between Church and State, is declared by Cardinal Newman to have "no dogmatic force." You seem to think that Catholics must be all alike in mind and in heart, as though they had been poured into and taken out of the same mould. You have no more right to ask me to defend as part of my faith every statement coming from a prelate than I should have to ask you to accept as an article of your religious faith every statement of an Episcopal bishop, or of your political faith every statement of a President of the United States. So little are these matters of the essence of my faith that I, a devout Catholic since childhood, never heard of them until I read your letter. Nor can you quote from the canons of our faith a syllable that would make us less good citizens than non-Catholics. . . .

Under our system of government the electorate entrusts to its officers of every faith the solemn duty of action according to the dictates of conscience. I may fairly refer once more to my own record to support these truths. No man, cleric or lay, has ever directly or indirectly attempted to exercise Church influence on my administration of any office I have ever held, nor asked me to show special favor to Catholics or exercise discrimination against non-Catholics.

It is a well-known fact that I have made all of my appointments to public office on the basis of merit and have never asked any man about his religious belief. In the first month of this year there gathered in the Capitol at Albany the first Governor's cabinet that ever sat in this State. It was composed, under my appointment, of two Catholics, thirteen Protestants, and one Jew. The man closest to me in the administration of the government of the State of New York is he who bears the title of Assistant to the Governor. He had been connected with the Governor's office for thirty years, in subordinate capacities, until I promoted him to the position which makes him the sharer with me of my every thought and hope and ambition in the administration of the State. He is a Protestant, a Republican, and a thirty-second-degree Mason. In my public life I have exemplified that complete separation of Church from State which is the faith of American Catholics to-day.

I summarize my creed as an American Catholic. I believe in the worship of God according to the faith and practice of the Roman Catholic Church. I recognize no power in the institutions of my Church to interfere with the operations of the Constitution of the United States or the enforcement of the law of the land. I believe in absolute freedom of conscience for all men and in equality of all churches, all sects, and all beliefs before the law as a matter of right and not as a matter of favor. I believe in the absolute separation of Church and State and in the strict enforcement of the provisions of the Constitution that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. I believe that no tribunal of any church has any power to make any decree of any force in the law of the land, other than to establish the status of its own communicants within its own church. I believe in the support of the public school as one of the corner stones of American liberty. I believe in the right of every parent to choose whether his child shall be educated in the public school or in a religious school supported by those of his own faith. I believe in the principle of noninterference by this country in the internal affairs of other nations and that we should stand steadfastly against any such interference by whomsoever it may be urged. And I believe in the common brotherhood of man under the common fatherhood of God.

In this spirit I join with fellow Americans of all creeds in a fervent prayer that never again in this land will any public servant be challenged because of the faith in which he has tried to walk humbly with his God.

Very truly yours

Document 11. John F. Kennedy on Church and State (1960)

The belief that Catholics unhesitatingly took orders from the Vatican persisted well after the decline of the Klan, and John Kennedy, the first Catholic to receive a major party presidential nomination after the Smith defeat of 1928, found that it dogged his campaign. Finally, he decided to face it head-on, and spoke to a meeting of Southern Baptist ministers about his beliefs as a Catholic and his duties as an American citizen. It is widely believed that this talk, which received national attention, did much to defuse the religious issue in the election.

* * *

I am grateful for your generous invitation to state my views.

While the so-called religious issue is necessarily and properly the chief topic here tonight, I want to emphasize from the outset that I believe that we have far more critical issues in the 1960 election: the spread of Communist influence, until it now festers only ninety miles off the coast of Florida—the humiliating treatment of our President and Vice-President by those who no longer respect our power—the hungry children I saw in West Virginia, the old people who cannot pay their doctor's bills, the families forced to give up their farms—an America with too many slums, with too few schools, and too late to the moon and outer space.

These are the real issues which should decide this campaign. And they are not religious issues—for war and hunger and ignorance and despair know no religious barrier.

But because I am a Catholic, and no Catholic has

ever been elected President, the real issues in this campaign have been obscured—perhaps deliberately in some quarters less responsible than this. So it is apparently necessary for me to state once again—not what kind of church I believe in, for that should be important only to me, but what kind of America I believe in.

I believe in an America where the separation of church and state is absolute—where no Catholic prelate would tell the President (should he be a Catholic) how to act and no Protestant minister would tell his parishioners for whom to vote—where no church or church school is granted any public funds or political preference—and where no man is denied public office merely because his religion differs from the President who might appoint him or the people who might elect him.

I believe in an America that is officially neither Catholic, Protestant nor Jewish—where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source—where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials—and where religious liberty is so indivisible that an act against one church is treated as an act against all.

For while this year it may be a Catholic against whom the finger of suspicion is pointed, in other years it has been, and may someday be again, a Jew—or a Quaker—or a Unitarian—or a Baptist. It was Virginia's harassment of Baptist preachers, for example, that led to Jefferson's statute of religious freedom. Today, I may be the victim—but tomorrow it may be you—until the whole fabric of our harmonious society is ripped apart at a time of great national peril.

Finally, I believe in an America where religious intolerance will someday end—where all men and all churches are treated as equal—where every man has the same right to attend or not attend the church of his choice—where there is no Catholic vote, no anti-Catholic vote, no bloc voting of any kind—and where Catholics, Protestants and Jews, both the lay and the pastoral level, will refrain from those attitudes of disdain and division which have so often marred their works in the past, and promote instead the American ideal of brotherhood.

That is the kind of America in which I believe. And it represents the kind of Presidency in which I believe—a great office that must be neither humbled by making it the instrument of any religious group, nor tarnished by arbitrarily withholding it, its occupancy, from the members of any religious group. I believe in a President whose views on religion are his own private affair, neither imposed upon him by the nation or imposed by the nation upon him as a condition to holding that office.

I would not look with favor upon a President working to subvert the First Amendment's guarantees of religious liberty (nor would our system of checks and balances permit him to do so). And neither do I look with favor upon those who would work to subvert Article VI of the Constitution by requiring a religious test—even by indirection—for if they disagree with that safeguard, they should be openly working to repeal it.

I want a Chief Executive whose public acts are responsible to all and obligated to none—who can attend any ceremony, service or dinner his office may appropriately require him to fulfill—and whose fulfillment of his Presidential office is not limited or conditioned by any religious oath, ritual or obligation.

This is the kind of America I believe in—and this is the kind of America I fought for in the South Pacific and the kind my brother died for in Europe. No one suggested then that we might have a "divided loyalty," that we did "not believe in liberty" or that we belonged to a disloyal group that threatened "the freedoms for which our forefathers died."

And in fact this is the kind of America for which our forefathers did die when they fled here to escape religious test oaths, that denied office to members of less favored churches, when they fought for the Constitution, the Bill of Rights, the Virginia Statute of Religious Freedom—and when they fought at the shrine I visited today—the Alamo. For side by side with Bowie and Crockett died Fuentes and McCafferty and Bailey and Bedillio and Carey—but no one knows whether they were Catholics or not. For there was no religious test there.

I ask you tonight to follow in that tradition, to judge me on the basis of fourteen years in the Congress—on my declared stands against an ambassador to the Vatican, against unconstitutional aid to parochial schools, and against any boycott of the public schools (which I attended myself)—instead of judging me on the basis of these pamphlets and publications we have all seen that carefully select quotations out of context from the statements of Catholic Church leaders, usually in other countries, frequently in other centuries, and rarely relevant to any situation here—and always omitting, of course, that statement of the American bishops in 1948 which strongly endorsed church-state separation.

I do not consider these other quotations binding upon my public acts—why should you? But let me say, with respect to other countries, that I am wholly opposed to the state being used by any religious group, Catholic or Protestant, to compel, prohibit or persecute the free exercise of any other religion. And that goes for any persecution at any time, by anyone, in any country.

And I hope you and I condemn with equal fervor those nations which deny their Presidency to Protestants and those which deny it to Catholics. And rather than cite the misdeeds of those who differ, I would also cite the record of the Catholic Church in such nations as France and Ireland—and the independence of such statesmen as de Gaulle and Adenauer.

But let me stress again that these are my views—for, contrary to common newspaper usage, I am not the Catholic candidate for President. I am the Democratic Party candidate for President, who happens also to be a Catholic.

I do not speak for my church on public matters—and the church does not speak for me.

Whatever issue may come before me as President, if I should be elected—on birth control, divorce, censor-

ship, gambling, or any other subject—I will make my decision in accordance with these views, in accordance with what my conscience tells me to be in the national interest, and without regard to outside religious pressure or dictate. And no power or threat of punishment could cause me to decide otherwise.

But if the time should ever come—and I do not concede any conflict to be remotely possible—when my office would require me to either violate my conscience, or violate the national interest, then I would resign the office, and I hope any other conscientious public servant would do likewise.

But I do not intend to apologize for these views to my critics of either Catholic or Protestant faith, nor do I intend to disavow either my views or my church in order to win this election. If I should lose on the real issues, I shall return to my seat in the Senate, satisfied that I tried my best and was fairly judged.

But if this election is decided on the basis that 40,000,000 Americans lost their chance of being President on the day they were baptized, then it is the whole nation that will be the loser in the eyes of Catholics and non-Catholics around the world, in the eyes of history, and in the eyes of our own people.

But if, on the other hand, I should win this election, I shall devote every effort of mind and spirit to fulfilling the oath of the Presidency—practically identical, I might add, with the oath I have taken for fourteen years in the Congress. For, without reservation, I can, and I quote, "solemnly swear that I will faithfully execute the office of President of the United States and will to the best of my ability preserve, protect and defend the Constitution, so help me God."

Document 12. *Everson v. Board of Education* (1947)

A New Jersey statute allowed reimbursement by local school boards to parents who paid to have their children transported on local school buses to parochial schools. The Court had already adopted a general rule in Cochran v. Louisiana State Board of Education *(1930) that the state could provide money for the benefit of the pupil, in that case the purchase of secular subject textbooks for parochial school students.* Everson *is the first of the modern Establishment Clause cases, and it is likely that had it been decided later, it might have gone the other way. Justice Douglas, in the majority here, later said that he believed the dissenting opinion of Justice Rutledge more in line with the idea of the "wall of separation" noted at the end of the majority opinion. But with* Everson, *the First Amendment's proscriptions on religion would henceforth be applied to the states as well as to the federal government.*

* * *

Mr. Justice BLACK delivered the opinion of the Court.

The only contention here is that the state statute and the resolution, insofar as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in two respects, which to some extent overlap. *First.* They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. *Second.* The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of state power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.

First. It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or "hitchhiking." . . .

Second. The New Jersey statute is challenged as a "law respecting an establishment of religion." Whether this law is one respecting an "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. . . .

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

We must not strike down the New Jersey law if it is within the State's constitutional power even though it approaches the verge of that power. New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens

of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Mr. Justice RUTLEDGE, with whom Mr. Justice FRANKFURTER, Mr. Justice JACKSON and Mr. Justice BURTON agree, dissenting.

The Amendment's purpose was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. . . . Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own. The prohibition is absolute. The funds used here in fact give aid and encouragement to religious instruction. The reimbursement program not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching. There is undeniably an admixture of religious with secular teaching in all such institutions. That is the very reason for their being. Commingling the religious with the secular teaching does not divest the whole of its religious permeation and emphasis. Indeed, on any other view, the constitutional prohibition always could be brought to naught by adding a modicum of the secular. Transportation where it is needed is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation. Now, as in Madison's time, not the amount but the principle of assessment is wrong.

But we are told that the New Jersey statute is valid in its present application because the appropriation is for a public, not a private purpose, namely, the promotion of education, and the majority accept this idea in the conclusion that all we have here is "public welfare legislation." If that is true and the Amendment's force can be thus destroyed, what has been said becomes all the more pertinent. For then there could be no possible objection to more extensive support of religious education by New Jersey. It is not because religious teaching does not promote the public or the individual's welfare, but because neither is furthered when the state promotes religious education, that the Constitution forbids it to do so. In failure to observe that distinction lies the fallacy of the "public function"-"social legislation" argument, a fallacy facilitated by easy transference of the argument's basing from due process unrelated to any religious aspect to the First Amendment.

Public money devoted to payment of religious costs, education or other, brings request for more. It brings, too, the struggle of sect against sect for the larger share or for any. That is precisely the history of societies which have had an established religion and dissident groups. It is the very thing Jefferson and Madison sought to guard against, whether in its blunt or in its more screened forms. The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions.

No one conscious of religious values can be unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. Nor can one happily see benefits denied to children which others receive. But if those feelings should prevail, there would be an end to our historic constitutional policy and command. No more unjust or discriminatory in fact is it to deny attendants at religious schools the cost of their transportation than it is to deny them tuitions, sustenance for their teachers, or any other educational expense which others receive at public cost. Discrimination in the legal sense does not exist. The child attending the religious school has the same

right as any other to attend public school. But he foregoes exercising it because the same guaranty which assures this freedom forbids any state agency to give or aid him in securing the religious instruction he seeks. Nor is the case comparable to one of furnishing fire or police protection, or access to public highways. These things are matters of common right, part of the general need for safety. Certainly the fire department must not stand idly by while the church burns. . . .

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. Both avenues were closed by the Constitution. Neither should be opened by this Court. . . .

Document 13. *McCollum v. Board of Education* (1948)

In the nineteenth century, at the time the common school movement began, religious instruction was often part of the regular curriculum, although it was rarely called that. Later on, after the great wave of migration at the end of the century, schools adopted so-called "released time" programs when ministers would come into the school building once a week to provide outright religious instruction for those students whose parents desired it.

* * *

Mr. Justice BLACK delivered the opinion of the Court.

This case relates to the power of a state to utilize its tax-supported public school system in aid of religious instruction insofar as that power may be restricted by the First and Fourteenth Amendments to the Federal Constitution.

The appellant, Vashti McCollum . . . alleged that religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law. The petitioner charged that this joint public-school religious-group program violated the First and Fourteenth Amendments to the United States Constitution. The prayer of her petition was that the Board of Education be ordered to "adopt and enforce rules and regulations prohibiting all instruction in and teaching of all religious education in all public schools in Champaign District Number 71, * * * and in all public school houses and buildings in said district when occupied by public schools." . . . In 1940 interested members of the Jewish, Roman Catholic, and a few of the Protestant faiths formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades four to nine inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; they were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools. The classes were taught in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi, although for the past several years there have apparently been no classes instructed in the Jewish religion. Classes were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.

The foregoing facts show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in Everson v. Board of Education. . . .

Recognizing that the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and the minority in the Everson case, counsel for the respondents challenge those views as dicta and urge that we reconsider and repudiate them. They argue that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions. In addition they ask that we distinguish or overrule our holding in the Everson case that the Fourteenth Amendment made the "establishment of religion" clause of the First Amendment applicable as a prohibition against the States. After giving full consideration to the arguments presented we are unable to accept either of these contentions.

To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guar-

anty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.

Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State.

The cause is reversed and remanded to the State Supreme Court for proceedings not inconsistent with this opinion.

Justices FRANKFURTER, JACKSON, RUTLEDGE, and BURTON filed a separate opinion concurring in the result.

Mr. Justice REED dissented.

Document 14. *Zorach v. Clauson* (1952)

Zorach *appears as an anomoly in the Court's record of Establishment Clause cases, and it must be understood as an early step in the Court's effort to determine how high and impregnable the wall of separation should be. There was an enormous public outcry against the* McCollum *decision, and despite claims that the judiciary is insensitive to public opinion, judges, as Mr. Dooley noted, do "follow the election returns." Here the Court seized upon a surface distinction to support a program which differed only in form, but not in substance, from that which had been struck down in* McCollum.

* * *

Mr. Justice DOUGLAS delivered the opinion of the Court.

New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.

This "released time" program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case is therefore unlike McCollum v. Board of Education, which involved a "released time" program from Illinois. In that case the classrooms were turned over to religious instructors. We accordingly held that the program violated the First Amendment. . . .

It takes obtuse reasoning to inject any issue of the "free exercise" of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any. There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented. Hence we put aside that claim of coercion both as respects the "free exercise" of religion and "an establishment of religion."

Moreover, apart from that claim of coercion, we do not see how New York by this type of "released time" program has made a law respecting an establishment of religion within the meaning of the First Amendment. There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated and within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether

she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act.

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here. The constitutional standard is the separation of Church and State. The problem is one of degree.

In the McCollum case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, the public schools do no more than accommodate their schedules to a program of outside religious instructions. We follow McCollum. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.

Affirmed.

Mr. Justice BLACK, dissenting.

In the New York program, as in that of Illinois (invalidated in McCollum) the school authorities release some of the children on the condition that they attend the religious classes, get reports on whether they attend, and hold the other children in the school building until the religious hour is over. As we attempted to make categorically clear, the McCollum decision would have been the same if the religious classes had not been held in the school building. New York is manipulating its compulsory education laws to help religious sects get pupils. This is not separation but combination of Church and State. . . .

Mr. Justice JACKSON, dissenting.

This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality. Stripped to its essentials, the plan has two stages, first, that the State compel each student to yield a large part of his time for public secular education and, second, that some of it be "released" to him on condition that he devote it to sectarian religious purposes. If public education were taking so much of the pupils' time as to injure the public or the students' welfare by encroaching upon their religious opportunity, simply shortening everyone's school day would facilitate voluntary and optional attendance at Church classes. But that suggestion is rejected upon the ground that if they are made free many students will not go to the Church. Hence, they must be deprived of freedom for this period, with Church attendance put to them as one of the two permissible ways of using it.

The greater effectiveness of this system over voluntary attendance after school hours is due to the truant officer who, if the youngster fails to go to the Church school, dogs him back to the public schoolroom. Here schooling is more or less suspended during the "released time" so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to Church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion. I challenge the Court's suggestion that opposition to this plan can only be antireligious, atheistic, or agnostic. My evangelistic brethren confuse an objection to compulsion with an objection to religion. It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar. A number of Justices just short of a majority of the majority that promulgates today's passionate dialectics and "epithetical jurisprudence" joined in answering them in McCollum. The distinction attempted between that case and this is trivial, almost to the point of cynicism. The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law.

Document 15. *Grand Rapids School District v. Ball* (1985)

The "parochaid" program, as it was called, enjoyed much popular support, and many people believed that since its primary purpose was to benefit the children, it might pass constitutional muster. Although there is a sharp division between the majority and minority opinions, both indicate a heightened sensitivity to the need for a clear delineation between church and state activities. Although some justices supported the program, Justice Brennan's majority opinion is reflective of the strict standards the Court has adopted in Establishment Clause cases.

* * *

Justice BRENNAN delivered the opinion of the Court.

The School District of Grand Rapids, Michigan, adopted two programs in which classes for nonpublic

school students are financed by the public school system, taught by teachers hired by the public school system, and conducted in "leased" classrooms in the nonpublic schools. Most of the nonpublic schools involved in the programs are sectarian religious schools. This case raises the question whether these programs impermissibly involve the government in the support of sectarian religious activities and thus violate the Establishment Clause of the First Amendment.

At issue in this case are the Community Education and Shared Time programs offered in the nonpublic schools of Grand Rapids, Michigan. These programs, first instituted in the 1976–1977 school year, provide classes to nonpublic school students at public expense in classrooms located in and leased from the local nonpublic schools.

The Shared Time program offers classes during the regular school day that are intended to be supplementary to the "core curriculum" courses that the State of Michigan requires as a part of an accredited school program. Among the subjects offered are "remedial" and "enrichment" mathematics, "remedial" and "enrichment" reading, art, music, and physical education. A typical nonpublic school student attends these classes for one or two class periods per week; approximately "ten percent of any given nonpublic school student's time during the academic year would consist of Shared Time instruction." Although Shared Time itself is a program offered only in the nonpublic schools, there was testimony that the courses included in that program are offered, albeit perhaps in a somewhat different form, in the public schools as well. All of the classes that are the subject of this case are taught in elementary schools, with the exception of Math Topics, a remedial math course taught in the secondary schools.

The Shared Time teachers are full-time employees of the public schools, who often move from classroom to classroom during the course of the school day. A "significant portion" of the teachers (approximately 10%) "previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed." The School District of Grand Rapids hires Shared Time teachers in accordance with its ordinary hiring procedures. The public school system apparently provides all of the supplies, materials, and equipment used in connection with Shared Time instruction.

Both programs are administered similarly. The Director of the program, a public school employee, sends packets of course listings to the participating nonpublic schools before the school year begins. The nonpublic school administrators then decide which courses they want to offer. The Director works out an academic schedule for each school, taking into account, *inter alia*, the varying religious holidays celebrated by the schools of different denominations.

Nonpublic school administrators decide which classrooms will be used for the programs, and the Director then inspects the facilities and consults with Shared Time teachers to make sure the facilities are satisfactory. The public school system pays the nonpublic schools for the use of the necessary classroom space by entering into "leases" at the rate of $6 per classroom per week. The "leases," however, contain no mention of the particular room, space, or facility leased and teachers' rooms, libraries, lavatories, and similar facilities are made available at no additional charge. Each room used in the programs has to be free of any crucifix, religious symbol, or artifact, although such religious symbols can be present in the adjoining hallways, corridors, and other facilities used in connection with the program. During the time that a given classroom is being used in the programs, the teacher is required to post a sign stating that it is a "public school classroom." However, there are no signs posted outside the school buildings indicating that public school courses are conducted inside or that the facilities are being used as a public school annex.

Although petitioners label the Shared Time and Community Education students as "part-time public school students," the students attending Shared Time and Community Education courses in facilities leased from a nonpublic school are the same students who attend that particular school otherwise. There is no evidence that any public school student has ever attended a Shared Time or Community Education class in a nonpublic school. The District Court found that "though Defendants claim the Shared Time program is available to all students, the record is abundantly clear that only nonpublic school students wearing the cloak of a 'public school student' can enroll in it." The District Court noted that "whereas public school students are assembled at the public facility nearest to their residence, students in religious schools are assembled on the basis of religion without any consideration of residence or school district boundaries." Thus, "beneficiaries are wholly designated on the basis of religion," and these "public school" classes, in contrast to ordinary public school classes which are largely neighborhood-based, are as segregated by religion as are the schools at which they are offered.

Forty of the forty-one schools at which the programs operate are sectarian in character. The schools of course vary from one another, but substantial evidence suggests that they share deep religious purposes. For instance, the Parent Handbook of one Catholic school states the goals of Catholic education as "a God oriented environment which *permeates* the total educational program." "a Christian atmosphere which guides and encourages participation in the church's commitment to social justice," and "a continuous development of knowledge of the Catholic faith, its traditions, teachings and theology." A policy statement of the Christian schools similarly proclaims that "it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but *the Word of God must be an all-pervading force in the educational program.*" These Christian schools require all parents seeking to enroll their children either to subscribe to a particular doctrinal statement or to agree to have their children taught according to the doctrinal statement. The District Court found that the schools are "pervasively sectarian," and concluded "without hesitation that the purposes of these schools is to advance their particular religions," and that "a

substantial portion of their functions are subsumed in the religious mission." . . .

Since *Everson* made clear that the guarantees of the Establishment Clause apply to the States, we have often grappled with the problem of state aid to nonpublic, religious schools. In all of these cases, our goal has been to give meaning to the sparse language and broad purposes of the Clause, while not unduly infringing on the ability of the States to provide for the welfare of their people in accordance with their own particular circumstances. Providing for the education of schoolchildren is surely a praiseworthy purpose. But our cases have consistently recognized that even such a praiseworthy, secular purpose cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly entangles the government in matters religious. For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion. Only in this way can we "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" and "sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma."

With respect to the Community Education Program, the District Court found that "virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school." These instructors, many of whom no doubt teach in the religious schools precisely because they are adherents of the controlling denomination and want to serve their religious community zealously, are expected during the regular school day to inculcate their students with the tenets and beliefs of their particular religious faiths. Yet the premise of the program is that those instructors can put aside their religious convictions and engage in entirely secular Community Education instruction as soon as the school day is over. Moreover, they are expected to do so before the same religious-school students and in the same religious school classrooms that they employed to advance religious purposes during the "official" school day. Nonetheless, as petitioners themselves asserted, Community Education classes are not specifically monitored for religious content.

We do not question that the dedicated and professional religious school teachers employed by the Community Education program will attempt in good faith to perform their secular mission conscientiously. Nonetheless, there is a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular school day will infuse the supposedly secular classes they teach after school. The danger arises "not because the public employee [is] likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course."

It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice. . . .

In the programs challenged in this case, the religious school students spend their typical school day moving between religious-school and "public-school" classes. Both types of classes take place in the same religious-school building and both are largely composed of students who are adherents of the same denomination. In this environment, the students would be unlikely to discern the crucial difference between the religious-school classes and the "public-school" classes, even if the latter were successfully kept free of religious indoctrination. As one commentator has written: "This pervasive [religious] atmosphere makes on the young student's mind a lasting imprint that the holy and transcendental should be central to all facets of life. It increases respect for the church as an institution to guide one's total life adjustments and undoubtedly helps stimulate interest in religious vocations. . . . In short, the parochial school's total operation serves to fulfill both secular and religious functions concurrently, and the two cannot be completely separated. Support of any part of its activity entails some support of the disqualifying religious function of molding the religious personality of the young student." . . . This effect—the symbolic union of government and religion in one sectarian enterprise—is an impermissible effect under the Establishment Clause.

Document 16. *Engel v. Vitale* (1962)

No other Establishment Clause case has generated as much public controversy, nor has any been so misunderstood. In terms of classic Jeffersonian theory, nothing could have been more out of line with the idea of religious freedom than a state-mandated prayer. The case, despite much criticism that it forbade students to pray, did no such thing; it only forbade the state from requiring students to pray, and in a specified manner.

* * *

Mr. Justice BLACK delivered the opinion of the Court.

The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, directed the School District's principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day:

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

This daily procedure was adopted on the recommendation of the State Board of Regents, a governmental agency created by the State Constitution to which the New York Legislature has granted broad supervisory, executive, and legislative powers over the State's public school system.[1] These state officials composed the prayer which they recommended and published as a part of their "Statement on Moral and Spiritual Training in the Schools," saying: "We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.". . .

We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious, none of the respondents has denied this and the trial court expressly so found:

The petitioners contend among other things that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America. The Book of Common Prayer, which was created under governmental direction and which was approved by Acts of Parliament in 1548 and 1549, set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England. The controversies over the Book and what should be its content repeatedly threatened to disrupt the peace of that country as the accepted forms of prayer in the established church changed with the views of the particular ruler that happened to be in control at the time. Powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the Government and obtain amendments of the Book more suitable to their respective notions of how religious services should be conducted in order that the official religious establishment would advance their particular religious beliefs. Other groups, lacking the necessary political power to influence the Government on the matter, decided to leave England and its established church and seek freedom in America from England's governmentally ordained and supported religion.

It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies. Indeed, as late as the time of the Revolutionary War, there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five. But the successful Revolution against English political domination was shortly followed by intense opposition to the practice of establishing religion by law. This opposition crystallized rapidly into an effective political force in Virginia where the minority religious groups such as Presbyterians, Lutherans, Quakers and Baptists had gained such strength that the adherents to the established Episcopal Church were actually a minority themselves. In 1785-1786, those opposed to the established Church, led by James Madison and Thomas Jefferson, who, though themselves not members of any of these dissenting religious groups, opposed all religious establishments by law on grounds of principle, obtained the enactment of the famous "Virginia Bill for Religious Liberty" by which all religious groups were placed on an equal footing so far as the State was concerned. Similiar though less far-reaching legislation was being considered and passed in other States.

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was

added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is "nondenominational" and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind—a law which was consistently flouted by dissenting religious groups in England and which contributed to widespread persecutions of people like John Bunyan who persisted in holding "unlawful [religious] meetings * * * to the great disturbance and distraction of the good subjects of this kingdom * * * ." And they knew that similar persecutions had received the sanction of law in several of the colonies in this country soon after the establishment of official religions in those colonies. It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion. The New York laws officially prescribing the Regents' prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself.

It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of that history many people have devoutly believed that "More things are wrought by prayer than this world dreams of." It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people

themselves and to those the people choose to look to for religious guidance.

It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

> It is proper to take alarm at the first experiment on our liberties. * * * Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"

The judgment of the Court of Appeals of New York is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Document 17. *Abington Township v. Schempp* (1963)

Coming only a year after Engel, *this case fueled criticism that the Court wanted to banish God and religion from the schools. But, as in the prayer decision, the Court did not banish the Bible from public school; it only forbade the use of the Bible for religious purposes. Considering the protest against* Engel, *it is a sign of the Court's increased commitment to erecting the wall of separation that it agreed to hear and to decide this case so soon afterward.*

* * *

Mr. Justice CLARK delivered the opinion of the Court.

Once again we are called upon to consider the scope of the provision of the First Amendment to the United States Constitution which declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * ." These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible. While raising the basic questions under slightly different factual situations, the cases permit of joint treatment. In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment. . . .

On each school day at the Abington Senior High School between 8:15 and 8:30 a.m., while the pupils are attending their home rooms or advisory sections, opening exercises are conducted pursuant to the statute. The exercises are broadcast into each room in the school building through an intercommunications system and are conducted under the supervision of a teacher by students attending the school's radio and television workshop. Selected students from this course gather each morning in the school's workshop studio for the exercises, which include readings by one of the studnets of 10 verses of the Holy Bible, broadcast to each room in the building. This is followed by the recitation of the Lord's Prayer, likewise over the intercommunications system, but also by the students in the various classrooms, who are asked to stand and join in repeating the prayer in unison. The exercises are closed with the flag salute and such pertinent announcements as are of interest to the students. Participation in the opening exercises, as directed by the statute, is voluntary. The student reading the verses from the Bible may select the passages and read from any version he chooses, although the only copies furnished by the school are the King James version, copies of which were circulated to each teacher by the school district. During the period in which the exercises have been conducted the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures. There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises. The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises. . . .

II.

It is true that religion has been closely identified with our history and government. As we said in Engel v. Vitale, "The history of man is inseparable from the history of religion. And * * * since the beginning of that history many people have devoutly believed that 'More things are wrought by prayer than this world dreams of.'" In Zorach v. Clauson, (1952), we gave specific recognition to the proposition that "we are a religious people whose institutions presuppose a Supreme Being." The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, "So help me God." Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God. Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of military service wish to engage in voluntary worship. Indeed, only last year an official survey of the country indicated that 64% of our people have church membership, Bureau of the Cen-

sus, U.S. Department of Commerce, Statistical Abstract of the United States (83d ed. 1962), 48, while less than 3% profess no religion whatever. Id., at p. 46. It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are "earnestly praying, as * * * in duty bound, that the Supreme Lawgiver of the Universe * * guide them into every measure which may be worthy of his [blessing * * .]" Memorial and Remonstrance Against Religious Assessments. . . .

V.

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. . . .

The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in Zorach v. Clauson. The trial court in No. 142 has found that such an opening exercise is a religious ceremony and was intended by the State to be so. We agree with the trial court's finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause.

The case came up on demurrer, of course, to a petition which alleged that the uniform practice under the rule had been to read from the King James version of the Bible and that the exercise was sectarian. The short answer, therefore, is that the religious character of the exercise was admitted by the State. But even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties." Memorial and Remonstrance Against Religious Assessments.

It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be sajd that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of

the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.

Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs.

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. *In the relationship between man and religion, the State is firmly committed to a position of neutrality.* Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment.

Document 18. *Wallace v. Jaffree* (1985)

The opposition to the Engel *decision has remained persistent, and it has taken a variety of forms, including efforts to amend the Constitution. Recently, a number of states have passed so-called "moment of silence" laws. While the Supreme Court has not yet ruled definitively on this subject, it has made it clear, as in this case, that where the purpose of the moment of silence is to foster overt prayer, the law violates the First Amendment.*

* * *

Justice STEVENS delivered the opinion of the Court.

At an early stage of this litigation, the constitutionality of three Alabama statutes was questioned: (1) § 16-1-20, enacted in 1978, which authorized a one-minute period of silence in all public schools "for meditation"; (2) § 16-1-20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer"; and (3) § 16-1-20.2, enacted in 1982, which authorized teachers to lead "willing students" in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world."

. . . Before analyzing the precise issue that is presented to us, it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.

As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States. But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again. . . .

Just as the right to speak and the right to refrain from speaking are complimentary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces that right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain. . . .

The sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools. Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated, "No, I did not have no other purpose in mind." The State did not present evidence of *any* secular purpose. . . .

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. . . .Thus, only two conclusions are consistent with the text of § 16-1-20.1: (1) the statute was enacted to convey a message of State endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.

We must, therefore, conclude that the Alabama Legislature intended to change existing law and that it was motivated by the same purpose that the Gover-

nor's Answer to the Second Amended Complaint expressly admitted; that the statement inserted in the legislative history revealed; and that Senator Holmes' testimony frankly described. The Legislature enacted § 16-1-20.1 despite the existence of § 16-1-20 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice.

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the Government intends to convey a message of endorsement or disapproval of religion." The well-supported concurrent findings of the District Court and the Court of Appeals—that § 16-1-20.1 was intended to convey a message of State-approval of prayer activities in the public schools—make it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words "or voluntary prayer" to the statute. Keeping in mind, as we must, "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," we conclude that § 16-1-20.1 violates the First Amendment.

Document 19. *Epperson v. Arkansas* (1968)

One of the most famous trials of the early twentieth century was that of John Scopes for teaching evolution in violation of a Tennessee law forbidding the teaching of any theory which contradicted the story of creation in the Bible. After the seeming triumph of the modernists in the twenties, few states lent support to so-called "creationism" theory. With the rise of modern religious fundamentalism, however, there has been a concerted drive in some areas to either ban the teaching of evolution altogether, or to at least give equal to emphasis to evolution and creationist ideas. The Epperson *decision, while remaining the Court's definitive statement, has not gone unchallenged, and there are several cases now in the courts testing various efforts to go around* Epperson.

* * *

Mr. Justice FORTAS delivered the opinion of the Court.

I.

This appeal challenges the constitutionality of the "anti-evolution" statute which the State of Arkansas adopted in 1928 to prohibit the teaching in its public schools and universities of the theory that man evolved from other species of life. The statute was a product of the upsurge of "fundamentalist" religious fever of the twenties. The Arkansas statute was an adaption of the famous Tennessee "monkey law" which that State adopted in 1925. The constitutionality of the Tennessee law was upheld by the Tennessee Supreme Court in the celebrated *Scopes* case in 1927.

The Arkansas law makes it unlawful for a teacher in any state-supported school or university "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" this theory. Violation is a misdemeanor and subjects the violator to dismissal from his position. . . .Only Arkansas and Mississippi have such "anti-evolution" or "monkey" laws on their books. There is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in these States. Nevertheless, the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented.

II.

At the outset, it is urged upon us that the challenged statute is vague and uncertain and therefore within the condemnation of the Due Process Clause of the Fourteenth Amendment. The contention that the Act is vague and uncertain is supported by language in the brief opinion of Arkansas' Supreme Court. That court, perhaps reflecting the discomfort which the statute's quixotic prohibition necessarily engenders in the modern mind, stated that it "expresses no opinion" as to whether the Act prohibits "explanation" of the theory of evolution or merely forbids "teaching that the theory is true." Regardless of this uncertainty, the court held that the statute is constitutional. . . .

In any event, we do not rest our decision upon the asserted vagueness of the statute. On either interpretation of its language, Arkansas' statute cannot stand. It is of no moment whether the law is deemed to prohibit mention of Darwin's theory, or to forbid any or all of the infinite varieties of communication embraced within the term "teaching." Under either interpretation, the law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.

III.

The antecedents of today's decision are many and unmistakable. They are rooted in the foundation soil of our Nation. They are fundamental to freedom.

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

As early as 1872, this Court said: "The law knows no heresy, and is committed to the support of no

dogma, the establishment of no sect." This has been the interpretation of the great First Amendment which this Court has applied in the many and subtle problems which the ferment of our national life has presented for decision within the Amendment's broad command.

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." As this Court said in Keyishian v. Board of Regents, the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."

In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's "monkey law," candidly stated its purpose: to make it unlawful "to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Perhaps the sensational publicity attendant upon the *Scopes* trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to "the story of the Divine Creation of man" as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man.

Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.

The judgment of the Supreme Court of Arkansas is reversed.

Document 20. *Minersville School District v. Gobitis* (1940)

The Court's traditional distinction between belief and action began to undergo modification as the justices recognized that in some instances, belief would be stifled unless it could be accompanied by action, or in the flag salute cases, by refusal to act. Gobitis must be read in the context of an America confronted by a war already raging in Europe, and which threatened to engulf this country as well. Although the majority opinion has been overruled, it does provide a good example of how the court attempts to balance competing and legitimate interests.

* * *

Mr. Justice FRANKFURTER delivered the opinion of the Court.

A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test. Of such a nature is the present controversy.

Lillian Gobitis, aged twelve, and her brother William, aged ten, were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise. The local Board of Education required both teachers and pupils to participate in this ceremony. The ceremony is a familiar one. The right hand is placed on the breast and the following pledge recited in unison: "I pledge allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all." While the words are spoken, teachers and pupils extend their right hands in salute to the flag. The Gobitis family are affiliated with "Jehovah's Witnesses", for whom the Bible as the Word of God is the supreme authority. The children had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by command of scripture. . . .

We must decide whether the requirement of participation in such a ceremony, exacted from a child who refuses upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment.

Centuries of strife over the erection of particular dogmas as exclusive or all-comprehending faiths led to the inclusion of a guarantee for religious freedom in the Bill of Rights. The First Amendment, and the Fourteenth through its absorption of the First, sought to guard against repetition of those bitter religious struggles by prohibiting the establishment of a state religion and by securing to every sect the free exercise of its faith. So pervasive is the acceptance of this precious right that its scope is brought into question, as here, only when the conscience of individuals collides with the felt necessities of society.

Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law. Government may not interfere with organized or individual expression of belief or disbelief. Propagation of belief—or even of disbelief in the supernatural—is protected, whether in church or chapel, mosque or synagogue, tabernacle or meetinghouse. Likewise the Constitution assures generous immunity to the individ-

ual from imposition of penalties for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in government.

But the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow-men. When does the constitutional guarantee compel exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good? To state the problem is to recall the truth that no single principle can answer all of life's complexities. The right to freedom of religous belief, however dissident and however obnoxious to the cherished beliefs of others—even of a majority—is itself the denial of an absolute. But to affirm that the freedom to follow conscience has itself no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration. . . .Our present task then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other. But, because in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith. . . .

Situations like the present are phases of the profoundest problem confronting a democracy—the problem which Lincoln cast in memorable dilemma: "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?" No mere textual reading or logical talisman can solve the dilemma. And when the issue demands judicial determination, it is not the personal notion of judges of what wise adjustment requires which must prevail.

Unlike the instances we have cited, the case before us is not concerned with an exertion of legislative power for the promotion of some specific need or interest of secular society—the protection of the family, the promotion of health, the common defense, the raising of public revenues to defray the cost of government. But all these specific activities of government presuppose the existence of an organized political society. The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. "We live by symbols." The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution. This Court has had occasion to say that " * * * the flag is the symbol of the nation's power,—the emblem of freedom in its truest, best sense. * * * it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression." . . .

The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality. For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crochety beliefs. Perhaps it is best, even from the standpoint of those interests which ordinances like the one under review seek to promote, to give to the least popular sect leave from conformities like those here in issue. But the court-room is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it. . . .

What the school authorities are really asserting is the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt the state is normally at a disadvantage in competing with the parent's authority, so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote. Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when it is ingrained in a people's habits and not enforced against popular policy by the coercion of adjudicated law. That the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for us to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise. . . .

Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties. . . . Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

Mr. Justice STONE (dissenting).

The law which is thus sustained is unique in the history of Anglo-American legislation. It does more than suppress freedom of speech and more than prohibit the free exercise of religion, which concededly

are forbidden by the First Amendment and are violations of the liberty guaranteed by the Fourteenth. For by this law the state seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions. It is not denied that such compulsion is a prohibited infringement of personal liberty, freedom of speech and religion, guaranteed by the Bill of Rights, except in so far as it may be justified and supported as a proper exercise of the state's power over public education. Since the state, in competition with parents, may through teaching in the public schools indoctrinate the minds of the young, it is said that in aid of its undertaking to inspire loyalty and devotion to constituted authority and the flag which symbolizes it, it may coerce the pupil to make affirmation contrary to his belief and in violation of his religious faith. And, finally, it is said that since the Minersville School Board and others are of the opinion that the country will be better served by conformity than by the observance of religious liberty which the Constitution prescribes, the courts are not free to pass judgment on the Board's choice. . . .

The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. They presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression, and his freedom, and that of the state as well, to teach and persuade others by the communication of ideas. The very essence of the liberty which they guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.

History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection.

Document 21. ***West Virginia State Board of Education v. Barnette*** **(1943)**

Although this is a case about free exercise of religion, note Justice Jackson's emphasis on freedom of expression. In the 1940s a consensus had not yet developed that reglion-based conduct should be exempt from general regulatory laws. But the Court had developed a quarter-century's record of expanding the First Amendment's free speech clause, and as noted in the essay, all of the First Amendment's freedoms deal with various forms of expression.

* * *

Mr. Justice JACKSON delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in Minersville School District v. Gobitis, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government."

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's Gobitis opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly." . . .

What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent" and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days.

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency. . . .

The freedom asserted by these appellees does not

bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude. . . .

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question. . . .

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . .

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in Minersville School District v. Gobitis and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is affirmed.

Mr. Justice FRANKFURTER, dissenting.

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring that I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

What one can say with assurance is that the history out of which grew constitutional provisions for religious equality and the writings of the great exponents of religious freedom—Jefferson, Madison, John Adams, Benjamin Franklin—are totally wanting in justification for a claim by dissidents of exceptional immunity from civic measures of general applicability, measures not in fact disguised assaults upon such dissident views. The great leaders of the American Revolution were determined to remove political support from every religious establishment. They put on an equality the different religious sects—Episcopalians, Presbyterians, Catholics, Baptists, Methodists, Quakers, Huguenots—which, as dissenters, had been under the heel of the various orthodoxies that prevailed in different colonies. So far as the state was concerned, there was to be neither orthodoxy nor heterodoxy. And so Jefferson and those who followed him wrote guaranties of religious freedom into our constitutions. Religious minorities as well as religious majorities were to be equal in the eyes of the political state. But Jefferson and the others also knew that minorities may disrupt society. It never would have occurred to them to write into the Constitution the subordination of the general civil authority of the state to sectarian scruples.

The constitutional protection of religious freedom terminated disablities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that which except by leave of religious loyalties is within the domain of temporal power. Otherwise each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.

Document 22. *Sherbert v. Verner* (1963)

By 1963 a series of cases had established that religious dissenters could, within reason, be exempted from general statutory regulations if compliance restricted their free exercise of religion. The problem that arises, however, is whether by exempting the practitioners of one belief from such rules, the state has violated the Establishment Clause by granting them a preference. The Court has not always been consistent, but it has tried whenever possible to interpret the Free Exercise Clause broadly, provided the results were not unfair either to the state or to members of other religious bodies.

* * *

Mr. Justice BRENNAN delivered the opinion of the Court. . . .

Appellant, a Seventh-day Adventist, was discharged by her employer "because she would not work on Saturday, the Sabbath Day of her faith." She was unable to obtain other employment because she would not take Saturday work. Her claim for South Carolina state unemployment compensation was denied because the state compensation law barred benefits to workers who failed, without good cause, to accept "suitable work when offered." The highest state court sustained the denial of benefits.

If the state decision is to stand it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise; or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate." We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. Significantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty. When in times of "national emergency" the textile plants are authorized by the State to operate on Sunday, "no employee shall be required to work on Sunday who is conscientiously opposed to Sunday work." The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.

We must next consider whether some compelling state interest justifies the substantial infringement of appellant's First Amendment right. The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But no such objection appears to have been made before the state courts, and there is no proof whatever to warrant such fears of malingering or deceit. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if there were such risks, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.

In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in Braunfeld. That statute was saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Here no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits. . . .

In holding as we do, plainly we are not fostering the "establishment" of the Seventh-Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment. This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society. [Our] holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. . . .

Reversed and remanded.

Mr. Justice HARLAN, whom Mr. Justice WHITE joins, dissenting.

The highest state court consistently held that one is not "available for work" if his unemployment has resulted not from the inabilty of industry to provide a job but rather from personal circumstances, no matter how compelling. The fact that these personal consider-

ations sprang from her religious convictions was wholly without relevance to the state court's application of the law. Thus in no proper sense can it be said that the State discriminated against the appellant on the basis of her religious beliefs or that she was denied benefits *because* she was a Seventh-day Adventist. She was denied benefits just as any other claimant would be denied benefits who was not "available for work" for personal reasons. With this background, this Court's decision comes into clearer focus. What the Court is holding is that if the State chooses to condition unemployment compensation on the applicant's availability for work, it is constitutionally compelled to *carve out an exception*—and to provide benefits—for those whose unavailability is due to their religious convictions. Such a holding has particular significance in two respects.

First, despite the Court's protestations to the contrary, the decision necessarily overrules Braunfeld. Clearly, any differences between this case and Braunfeld cut against the present appellant. *Second*, the implications of the present decision are far more troublesome than its apparently narrow dimensions would indicate at first glance. The meaning of the holding is that the State must *single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated.

It has been suggested that such singling out of religious conduct for special treatment may violate the constitutional limitations on state action. My own view, however, is that at least under the circumstances of this case it would be a permissible accommodation of religion for the State, if it *chose* to do so, to create an exception to its eligibility requirements for persons like the appellant. The constitutional obligation of "neutrality" is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism. But I cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility in the present case. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between. Such compulsion in the present case is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the decision below on the exercise of appellant's religion and in light of the direct financial assistance to religion that today's decision requires. . . .

Document 23. *Wisconsin v. Yoder* (1972)

Although the Amish case has been widely praised, it has also elicited some criticism on grounds that it violates the principle of neutrality. The Court has not only protected the free exercise of the Amish, goes this argument, it has actually put them in a preferred position. At the very least, cases such as this raise the question of whether the Court should establish certain rules and stick to them, or be more flexible and accommodate to particular needs even at the risk of violating the wall of separation.

* * *

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to review a decision of the Wisconsin Supreme Court holding that respondents' convictions of violating the State's compulsory school-attendance law were invalid under the Free Exercise Clause. Respondents Jonas Yoder and Wallace Miller are members of the Old Order Amish Religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church. Wisconsin's compulsory school attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they completed the eighth grade. Respondents were convicted and fined $5 each. Trial testimony showed that they believed that by sending their children to high school, they would endanger their own salvation and that of their children. The State stipulated that respondents' religious beliefs were sincere. . . .

Amish beliefs require members of the community to make their living by farming or closely related activities. They object to formal education beyond the eighth grade because it tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competion; and separation from, rather than integration with, contemporary worldly society. An expert testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also ultimately result in the destruction of the Old Order Amish church community. Another expert testified that the Amish succeeded in preparing their high school age children to be productive members of the Amish community. The evidence also showed that the Amish have an excellent record as law-abiding and generally self-sufficient members of society.

A State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause, and the traditional interest of parents with respect to the religious upbringing of their children so long as they "prepare them for additional obligations." It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of

religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. . . .

We come then to the quality of respondents' claims. In evaluating them, we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clause.

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. This is shown by the fact that the Amish life is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world." This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocractic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community. . . .

The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. It raises a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region. In sum, enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs. The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. . . .

The State advances two primary arguments in support of its system of compulsory education. It notes that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system and that education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions. However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

The state attacks respondents' position as one fostering "ignorance" from which the child must be protected by the State. But this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern views. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes. A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

The State, however, supports its interest because of the possibility that some such children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life. However, on this record, that argument is highly speculative. There is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings. In fact, not only do the Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide an "ideal" vocational education for their children in the adolescent years. Wisconsin's interest in compelling attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance for children generally. . . .

Finally, the State, on authority of Prince v. Massachusetts, argues that a decision exempting Amish children from the State's requirement fails to recognize the subsequent right of the Amish child to a secondary education. But the Court was not confronted in Prince with a situation comparable to that of the Amish as revealed in this record. This case is not one in which any harm to the physical or mental health of

the child or to the public safety, peace, order, or welfare has been demonstrated. The record is to the contrary.

Contrary to the suggestion in Justice Douglas' dissent, our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent. The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation. The State has at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires, and indeed the record is to the contrary. . . .

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom. On this record we neither reach nor decide those issues.

It cannot be over-emphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life. In light of the "convincing showing" by the Amish here, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.

Affirmed.

"I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion or prohibiting the free exercise thereof, thus building a wall of separation between church and State."

Thomas Jefferson

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